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LAW REPORTS.

Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND EDMUND LUMLEY,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. IX.

FROM MICHAELMAS TERM, 1873, TO TRINITY TERM, 1874,

BOTH INCLUSIVE.

XXXVII VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXVII VICTORIA.

DICKENSON, Appellant; FLETCHER and Others, Respondents.

1873
Nov. 17.

Mines Regulation Act (23 & 24 *Vict. c.* 151), *ss.* 10, 22—*Non-observance of Rules—Liability of Mine-owner for Default on the Part of his Servants—Penalty—Construction of Penal Statute.*

9 C P 59
5 C P D 364

By the 10th section of the Mines Regulation Act (23 & 24 Vict. c. 151) it was provided that certain general rules should be observed in every coal mine by the owner and agent thereof; and among those rules was one providing that, whenever safety lamps were required to be used, they should be first examined and safely locked by a person or persons duly authorized for that purpose. The 22nd section of the Act imposed a penalty on the owner or agent if, through the default of such owner or agent, any of the general rules, the provisions of which ought to be observed by them, were neglected or wilfully violated.

The owner of a mine appointed a competent person to examine and lock the safety lamps required for use in the mine, but such person delivered out certain safety lamps to miners for use in the mine unlocked:—

Held, that in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him.

Case stated by justices under 20 & 21 Vict. c. 43, of which the facts were in substance as follows:—

An information had been preferred by the appellant, one of Her

1873

DICKENSON *v.* FLETCHER.

Majesty's inspectors of mines, against the respondents, as owners of a coal mine, for contravention of a certain provision of 23 & 24 Vict. c. 151, by not having the safety lamps used in the said mine first examined and securely locked by some person or persons duly authorized for that purpose before the said lamps were so used, contrary to s. 10 of the said Act.

The following evidence was given:—The mine in question was worked by means of naked lights, but each party of miners was supplied with a safety lamp, and required by the special rules of the colliery to try their working places for gas with such lamp before commencing work with the naked lights. A competent lamp-man was appointed at the colliery by the manager, and it was his duty, by the special rules, to take charge of the colliers' lamps, and to "daily examine and lock each lamp, including his own."

It was further proved that the manager had given him special orders that the lamps should always be locked when required to be used. On the day charged in the information the lamp-man gave out for use to certain colliers lamps which were not locked, and which were used by them in the said mine. Upon these facts the magistrates refused to convict, on the ground that the respondents, having duly appointed a competent manager, and such manager having, in the pursuance of his duty, appointed a competent lamp-man to take charge of the lamps and examine them daily, and keep them locked, and having directed him to keep them locked when required to be used, and there being no evidence to shew that it was any part of the manager's duty personally to inspect the lamps daily and see that they were locked, the neglect and violation of rule 3 of the 10th section of the statute before referred to was that of a certain other person than the respondents within the meaning of 23 & 24 Vict. c. 151, and not of the respondents, and the respondents were not personally liable. (1)

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(1) A similar information had been preferred against the agent of the owners, and a case was stated with reference to such information in similar terms to that stated in the case of the owners. The two cases were argued together.

The 23 & 24 Vict. c. 151, enacted as follows:—

Sect. 10. "The following rules (hereinafter referred to as the general rules) shall be observed in every colliery or coal mine and ironstone mine by the owner and agent thereof.

H. James, A. G. (with him *Bowen*), for the appellant. The 10th section of the Mines Regulation Act, 23 & 24 Vict. c. 151, enacts that certain rules shall be observed by the owner and agent. It is proved that the third rule has been violated. It must be admitted that the owner or agent cannot practically see to the fulfilment of the rule in person. As a rule, no doubt in criminal matters a person is only rendered liable for his own personal default or neglect, but by express enactment he may be rendered liable for that of another. The statute expressly casts the duty on the owner and agent. It may well be that the legislature intended that the owner and agent should be responsible for the acts of those employed by them, to the extent of being subject to a money penalty, in order to insure their taking the utmost care to entrust the duty of seeing that the rules are fulfilled to the most competent persons they can procure. It might be useless to inflict the penalty merely on the workman. As long as he only is punished there is no security that the master will take care that the rules are observed. Moreover there is no duty cast on any one by the statute in respect to the lamps, but the master and agent. If the respondents' contention is correct, the owner might free himself from all responsibility by appointing a mere boy or any other incompetent person to perform the duty.

[KEATING, J. Would not that amount to personal negligence on the part of the master?]

"3. Whenever safety lamps are required to be used they shall be first examined and securely locked by a person or persons duly authorized for this purpose."

Sect. 22. "If any coal mine, colliery, or ironstone mine be worked, and through the default of the owner or agent thereof special rules have not been established for the same according to the provisions of this Act, or the general rules or the special rules for such coal mine, colliery, or ironstone mine, by this Act required to be established, have not been hung up or affixed, or have not, after obliteration or destruction, been renewed or restored as required by this Act, or any of such general rules or special rules provisions of which ought to be observed by the owner and principal agent or viewer of such coal mine, colliery, or ironstone mine, be neglected or wilfully violated by any such owner, agent, or viewer, such person shall be liable to a penalty of not exceeding 20*l*."

These provisions have since been repealed by 35 & 36 Vict. c. 76, s. 76, but it has been thought expedient to report the decision with reference to its bearing upon the general principles applicable to the construction of penal enactments.

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The rule says nothing about the competence of the person appointed. If the contention be correct that all the master has to do to perform his duty under the 10th section is to appoint and authorize the person who is to see that the lamps are locked, it would appear that such duty would be fulfilled by appointing any person. At common law a person is liable in pecuniary damages, without any fault on his part, for the acts of his servant done in the scope of his employment. This act imposes a pecuniary penalty only. Why is there anything so very unreasonable in supposing that the Legislature, wishing to give the utmost protection to those engaged in a very dangerous employment, should make the owners liable to a mere pecuniary penalty for the default of their servants?

Manisty, Q.C. (*Fitzadam*, with him), for the respondents. There is, according to the well-established principles of the criminal law, a strong presumption against a construction of the statute which would make a person liable for that which was in no sense the result of any fault of his. It is admittedly impossible for the owner to look to the lamps himself. Here a person was appointed who must be taken to have been competent, and there was no personal default of the owners or agent. By the terms of the 22nd section, which imposes the penalty, it is only if the rule be broken "through the default of the owner or agent," that the penalty is incurred. It is submitted that "default" means not the mere fact that the rule has been broken, but something in the nature of personal neglect, e.g., appointing an obviously unfit person to see that the rule is observed.

[He cited 5 & 6 Vict. c. 99, s. 8; *Reg.* v. *Handley.* (1)]

KEATING, J. This case raises an important question, under the provisions of 23 & 24 Vict. c. 151. That Act was passed with the object of endeavouring to secure the safety of persons engaged in mining operations. The 10th section provides that "the following rules, hereinafter referred to as the general rules, shall be observed in every colliery, or coal mine, and ironstone mine, by the owner and agent thereof;" and the rule upon which the present case rests is the third rule, which provides that "whenever safety lamps are required to be used they shall be first examined and securely locked by a person or persons duly authorized for this purpose." It is provided, no doubt, that this rule shall be observed by the owner and agent, and the respondents in these cases are the owners and the agent of a coal mine. The 22nd section provides, that "if through the default of the owner or agent thereof," any of such general or special rules, the provisions of which ought to be observed by the owner and principal agent, or viewer of such coal mine, colliery, or ironstone mine, be neglected or wilfully violated by any such owner, agent, or viewer, such person shall be liable to a penalty not exceeding 20*l*. It was contended by the Attorney General that if in fact the lamp was not locked in pursuance of the rule, the owner was liable in virtue of that mere fact, and that it was quite immaterial whether he knew of it, and what amount of precaution he took to prevent it; that the Legislature, with a view to securing the safety of those who work in coal mines, had gone the length of enacting that in such case he should be liable to a penalty, without reference to any question of personal default on his part. In my opinion the effect of the statute cannot be pushed so far as that, and I found that opinion upon the words of the 22nd section, so much relied upon by Mr. Manisty, viz., "the default of the owner or agent thereof." Such a provision as the Attorney General contended this section amounted to, it would be very easy for the Legislature to enact in plain and express terms. Such an enactment would, however, be opposed to the general principle upon which penal consequences are made to follow acts of omission. That is to say, that when such consequences are to follow there must be something in the nature of an actual neglect or default. That a person should be made liable to a penalty, without any neglect or default on his part, is contrary to the principle so well established by a great number of cases in which the Courts, and especially this Court, have held that penalties are not incurred in the absence of mens rea. In the case of *Morden* v. *Porter* (1) no doubt it was held that the conviction was right, though it was strongly urged that there could be no liability to a penalty without mens rea; but the ground which was thrown out for the decision was, that trespass in pursuit of game was, to some extent, in the nature of a civil wrong. The case of *Nichols* v. *Hall* (1) is more analogous to the present case, and there it was held that the owner of diseased cattle could not be convicted under the Contagious Diseases (Animals) Acts for not giving notice, with all practicable speed, of the existence of the disease, in the absence of knowledge that the cattle were diseased. I may say that I think the subsequent legislation on the subject fortifies the view that I take of the construction of the former Act. It is provided by 35 & 36 Vict. c. 76, in several of the sections of that Act, that in the event of any contravention of the provisions of the Act, the owner, agent, and manager of the mine shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means to prevent such contravention. This is an explicit enactment in pari materiâ, and it appears to me to support the view which the Court takes of the intention of the legislature in 23 & 24 Vict. c. 151. For these reasons I am of opinion that the magistrates were right in refusing to convict.

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(1) 9 L. T. (N.S.) 827.

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(1) 7 C. B. (N.S.) 641; 29 L. J. (M.C.) 213.

BRETT, J. I confess I have had considerable doubt during the argument of this case, and do not even now feel quite so clear about it as I could wish. It cannot be denied that the Act under which the magistrates were called upon to impose a penalty is a penal enactment. The facts, which were asserted to render the owners and agent liable to such penalty, were these. The lamps were given out without being locked, by the neglect or wilful default of the person whose duty it was to give them out. It must be taken that such person, when appointed to perform such duty, was a person whom the owners and agent were entitled to appoint, as being a competent person, and that there was no personal default of the owners or agent. The question, therefore, is whether they are to be liable to a penalty in respect of the neglect or default of the person whom they so appointed, and were entitled to appoint. The question turns first on the meaning of the 10th section, and secondly on that of the 22nd. The 10th section lays down rules to be observed by the owners and agent of the mine, and it may be that if the rules are not observed, and an accident follows in consequence, the owner would be liable to an action in respect of injury done to any person by such accident; but it is quite a different kind of question whether he is to be liable to a penalty under the 22nd section, which would be incurred whether any accident followed or not. With regard to the construction of s. 10, I confess that I have a general impression that there will be a non-observance of that rule contained in it upon the mere fact of lamps being given out which are unlocked. Though it is not necessary to decide the point at present, I incline to think that if lamps were so delivered out, and an injury resulted, the owner and agent might be responsible in a civil action as for breach of the rule, on the ground that the 10th section throws on them the obligation of causing the rules contained in it to be observed. Here the question is altogether different; viz., whether a penalty has been incurred, though no injury has resulted. We are called upon to construe a penal enactment. Those who contend that the penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty. Assuming that s. 10 says that the rule is to be observed, and that the owners and agent are the persons to observe it, we have then to consider what the 22nd section says. It does not say, if the rule is not observed the owner and agent shall be subject to a penalty. It says, "If through the default of the owner or agent thereof," the rule has been neglected, then the penalty shall be incurred. I was inclined at first to think that the words, "through the default of the owner or agent" might be read as applicable only to the first part of the section, which provides for the establishment of special rules, and for the rules being hung up in the colliery; but it is clear, on consideration of the grammatical structure of the section, that this construction is untenable, and the words must be read as governing the whole of the provisions of the section. That being so, it appears to me that these words imply something in the nature of a personal default, and therefore the construction of the section on the whole seems rather against the view contended for by the appellant. I think, too, that we are entitled to consider the subsequent legislation in pari materiâ; for where two statutes dealing with the same subject matter use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other. If one uses distinct language, imposing a penalty under certain circumstances, and the other does not, it is always an argument that the Legislature did not intend to impose a penalty in the latter—for where they did so intend, they plainly said so. Construing this Act by the light of the subsequent legislation, I am of opinion that the magistrates were right in thinking no penalty had been incurred.

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(1) Law Rep. 8 C. P. 322.

DENMAN, J. I am also of opinion that the judgment should be for the respondents. The 22nd section is that on which the information is framed, and it complains that the defendants neglected or violated certain provisions to be observed by them under the 10th section. I think that the general principle on which penal statutes imposing a penalty for neglect to do any act must, in the absence of distinct words to the contrary, be construed is, that by neglect something in the nature of personal or wilful neglect is meant. It is argued that that cannot be the meaning in this Act, because by the 10th section it is enacted that the rules therein contained shall be observed by the owner and agent, and that the effect is that, if they are not, the owner and agent are in default, even if they were personally no parties to the neglect. The answer to that contention seems to be sufficiently given by my Brother Brett, when he pointed out that it was possible that the Legislature may have enacted these rules as rules the owner or agent is to cause to be observed, and if an accident occurs through non-observance of them, he may be liable to a civil action; but that is not inconsistent with the general rule that no penalty is incurred in the absence of personal neglect. The owner may not be personally aware that a breach of the rules contained in s. 10 is taking place. In the case, for instance, of the 3rd rule, as to lamps, it is not only possible that he may not be present when a breach of such rule is taking place, but it is absolutely impossible that he can always be present to see whether it is carried out. It would be straining the words of this Act, as it seems to me, far beyond the limits which the general rules of law

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and the decisions have laid down in the case of penal enactments, to say that under the mere word "neglect" a person is to be liable to penal consequences for what was wholly the default of some one in his employ, and not in any way his fault.

Judgment for the respondents.

Attorney for appellant: *Solicitor to the Treasury.*

Attorneys for respondents: *Sharpe, Parker, Pritchard, & Sharpe, for Pearce, Wigan.*

PEYTON *v.* HARTING.

Nov. 14.

Interrogatories—Insufficient Answer—Oral Examination of Party—Irrelevant Matter—Common Law Procedure Act, 1854, *s.* 53.

The answers to interrogatories may be insufficient within the meaning of the Common Law Procedure Act, 1854, s. 53, by reason of containing, in addition to the information asked for, impertinent or otherwise objectionable matter.

In this case interrogatories had been administered by the plaintiff to the defendant and answered. The plaintiff applied to a judge at chambers to order an oral examination of the defendant before a master, under the 53rd section of the Common Law Procedure Act, 1854, on the ground that the answers were insufficient, inasmuch as they contained various statements which were impertinent and matter of prejudice. It was contended for the defendant that, inasmuch as the answers in the defendant's affidavit answered the interrogatories, the introduction of additional and irrelevant matter could not make the answers insufficient within the meaning of the section. The judge made an order directing that the defendant should attend before the master and be examined orally as to the matters concerning which he had refused or omitted to make an affidavit.

Goddard moved for a rule nisi to rescind the above order. He contended, first, that the judge had no jurisdiction under the 53rd section of the Common Law Procedure Act, 1854, to order an oral examination unless the affidavit failed to answer the interrogatories; but if it did answer them, then that no amount of excess

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would make it insufficient within the meaning of the section; and, secondly, that the form of the order was bad, because it did not specify the points to which the oral examination was to be directed.

Keating, J. I am of opinion that there should be no rule. The question raised is one of some importance on account of its frequent occurrence. It is sought to set aside an order made by Baron Martin at Chambers under the 53rd section of the Common Law Procedure Act, 1854, directing that a party should attend before the master and be examined. To this order two objections are made. First, it is said that this is not a case within the meaning of the section, because the judge has only jurisdiction where there is an omission to answer the interrogatories, and that no excess by way of supplement to the answers given can give jurisdiction. In my opinion, where there is impertinent excess (using the term "impertinent" in the sense in which it is applied to Chancery proceedings) in an answer there is an omission to answer sufficiently and satisfactorily within the section. Therefore, if the judge is satisfied that the answers contain matter which is improper or impertinent, as destroying the effect of the answers or introducing irrelevant topics, all which is matter for his discretion, he has jurisdiction. Secondly, it is objected that, assuming that the judge had authority, the form of the order is improper, because it does not specify the points as to which the master is to examine the defendant. I am of opinion that the order cannot be objected to on this ground. If the rule were as suggested by Mr. Goddard, it is difficult to see how it could be complied with in practice. If the interrogatories and answers were long, it would be almost impossible to specify in the order all the points as to which objection arose as to the answers. It does not seem to me at all necessary to do so, or that any difficulty can arise from the form of the order in practice. The master will put the questions to the party examined, and obtain answers divested of the objectionable excess.

Brett, J. In this case an order was applied for and obtained to examine the defendant orally, on the ground that though the interrogatories had in fact been answered, they were not sufficiently or properly answered. To this order certain specific objections are taken. It is said that the affidavit categorically answered the interrogatories, and that where that is so, no matter of supererogation, of whatever kind or to whatever extent, can make the answers insufficient within the section. We are not called upon to determine whether there may be some amount of supererogatory matter, or if so, to lay down any rule as to what length such matter may go. The objection taken is that no such matter can vitiate a categorical answer.

I do not think that the objection can be supported. I think there must be some matter of supererogation which would make an answer insufficient. Whether in any particular case there is such matter as to render the answer insufficient which, without it, would be sufficient is a question for the discretion of the judge at chambers. Then with regard to the objection as to the form of the order, the case seems to me to come within the rule that that is certain which is capable of being rendered so. The order directs that the party shall answer orally as to the matters with respect to which he has refused or omitted to make an affidavit. At chambers objection was taken to the answers to certain interrogatories; when the case comes before the master, it can be rendered certain which are the interrogatories in question.

GROVE, J. I am of the same opinion. The judge at chambers considered that the defendant had refused or omitted to make a sufficient affidavit in answer to some of the interrogatories, and the order is that the party should be examined as to the matters concerning which he has refused or omitted to make an affidavit. It is contended that the judge should have specified in the order the particular points as to which the oral examination was to be made. It appears to me that this would often be impracticable, for the objection might not be to the answers to interrogatories 3 and 4, and so on, but such and such parts of the answers to certain interrogatories. I do not think that in general there can be any necessity for such particularity in the form of the order. Then with regard to the other objection, the learned judge considered that there would be an omission to answer within the Act by reason of the answers that were given being, taken as a whole, unsatisfactory, as, for example, by reason of their containing matters which would prevent the use of them at the trial, or matters partially or incompletely stated. Whether this would be so in any particular case must depend very much on individual opinion, but it appears to me clear that there may be matter amply sufficient to render an answer insufficient which, without such matter, might be unobjectionable. It seems to me that great inconvenience might arise if the judge had no jurisdiction or control over the answers to interrogatories, but wherever there was a categorical answer to the questions put the party answering might add any amount of supplemental matter, of whatever character, the effect of which might be such as completely to destroy any benefit obtainable by the other side from the interrogatories.

DENMAN, J. I am of the same opinion. Without saying that it is in every case the duty of the party merely to answer an interrogatory categorically even though such answer might in reality in some cases fail to convey the truth, I think that there may be such excess as may constitute insufficiency in the answer. The answer may be insufficient by reason of impertinency. Again, it may be insufficient by reason of its being so framed as to be an unfair attempt to prevent the other party from making any use of it. I think, in such a case, the judge's duty is to exercise his discretion as to whether the answer is sufficient or not, and if he comes to the conclusion that it is not, he has power to order an oral examination. With regard to the question as to the form of the order, I agree with the rest of the Court. There can be no real doubt as to the points on which the oral examination is required.

Rule refused.

Attorneys for applicant: *R. S. Taylor & Son.*

Re GREVILLE.

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Nov. 24.

Attorney and Solicitor—Articled Clerk—Service under Articles—Office or Employment other than under Articles—23 & 24 Vict. c. 127, s. 10.

An articled clerk held during the term of his articles the office of vestry clerk. It was shewn that the duties of the office had not interfered with the due performance of his duties under his articles or with his legal studies:—

Held, nevertheless, that he had contravened the provisions of 23 & 24 Vict. c. 127, s. 10, by holding an office or employment other than that of clerk to the attorney to whom he was articled.

Re Peppercorn (Law Rep. 1 C. P. 473) discussed.

THIS was an application that the examiners of the Incorporated Law Society might be directed to grant the applicant, an articled clerk, a certificate of having satisfactorily passed the intermediate examination.

It appeared that the applicant had been articled to Mr. Michael, an attorney, in February, 1871. His father, who held the appointment of vestry clerk of Wandsworth, died in 1872, and the applicant was then obliged to assist in maintaining the family, and being offered the appointment of vestry clerk as his father's successor, accepted and still held it.

On presenting himself for examination he was required to answer the usual questions as to the due service of his articles of clerkship up to the time of examination, when he stated that he held the appointment of vestry clerk.

The examiners examined him de bene esse, but declined to give him a certificate on the ground that he had contravened the provisions of 23 & 24 Vict. c. 127, s. 10. (1) His affidavit stated that the work connected with the vestry clerkship had been done

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(1) The section enacts that "no person hereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such attorney or solicitor and his partner or partners (if any) in the business, practice, or employment of an attorney or solicitor, save as by the 6 & 7 Vict. c. 73, or this Act otherwise provided, and every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove, by the affidavit required under s. 14 of 6 & 7 Vict. c. 73, that he has not held any office or engaged in any employment contrary to this enactment, and the form of such affidavit shall be varied by such addition thereto as may be necessary for this purpose."

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of an evening, with one or two very trifling exceptions, not amounting in the aggregate to more than three and a half days, and that he had never been absent without the consent of his principal, so that the appointment did not interfere with his regular attendance at the office, where he had attended full clerk's hours, and that he had in all respects acted as a regular clerk. He had paid an assistant to make out the rate-books, the only laborious work which might have interfered with his duties or studies, and consequently his office as vestry clerk had not interrupted in any way the regular performance of his duties by day nor his legal studies in the evening.

H. James, A. G., moved for a rule nisi on behalf of the applicant. The provisions of the section relate only to admission, not to the intermediate examination; but no objection is taken to the course pursued by the examiners on that ground. If the objection is fatal, it had better be taken now than at a later stage.

It may be questioned whether the section enacts a condition precedent, or is directory in its nature, and whether the Court has not a discretion in the matter in a case where, as in the present case, the spirit of the statute has certainly been complied with, if not the letter. The office which the applicant held was not in any way inconsistent with the due service of his articles, which is what the statute was aimed at insuring. *Re Peppercorn* (1) is a case almost identical with the present, and there the Court held that the section did not prevent the applicant's admission. There must be some limit to the meaning of the word "employment." Suppose that an articled clerk was a gentleman of literary tastes and contributed to the press, and was paid for his contributions, could that be said to be an employment other than employment as clerk? It is submitted that the words "other than" really amount to "inconsistent with."

Garth, Q.C,, and *Murray*, on behalf of the Incorporated Law Society, shewed cause in the first instance. The only object of the examiners is to put a right construction on the statute. It is difficult to see how the case can be taken out of the words of s. 10. [They were stopped by the Court.]

(1) Law Rep. 1 C. P. 473.

Coleridge, C.J. I am of opinion, though with regret, that this application must be refused. I do not think we can get over the plain words of the section. It clearly enacts, as a condition precedent to the right of admission, that the party shall not have held any office, or engaged in any employment, other than that of clerk under his articles. The applicant has not fulfilled that condition, inasmuch as he has held an office and engaged in an employment other than that of articled clerk. It seems to me that to hold otherwise would be to trifle with the words of the statute, and to afford a most striking illustration of the well known saying, that hard cases make bad law. The case of *Re Peppercorn* (1) was one of a very peculiar nature. The articled clerk there became steward of the manor in which himself and his family were beneficially interested. The stewardship devolved upon him as part of the family property, and by virtue of a family arrangement in order to protect such property. The case is altogether exceptional, and apparently the judgment must have been upon the ground that the words of the section were satisfied, and that no office was held within the meaning of them, for though Erle, C.J., uses the the word "office" in his judgment, he states that the judgment was arrived at after conferring with the judges of the Queen's Bench, who had previously decided the case the other way, on the ground that it fell within the letter, if not the spirit, of the statute. It would appear, therefore, that on reconsideration of the case they must have been satisfied that the letter of the statute was not infringed. The decision must be considered as resting on its own peculiar circumstances. We are not prepared to extend the application of it.

Keating, Brett, and Denman, JJ., concurred.

Rule refused.

Attorney for applicant: *Michael.*

Attorney for the Incorporated Law Society: *Williamson.*

(1) Law Rep. 1 C. P. 473.

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Nov. 6.

THE GREAT NORTHERN RAILWAY COMPANY *v.* WITHAM.

Contract—Consideration—Acceptance of Tender.

The plaintiffs advertised for tenders for the supply of stores for a period of twelve months. The defendant sent in a tender to supply the stores required for the period named, at certain fixed prices, "in such quantities as the company's store-keeper might order from time to time:" and the plaintiffs accepted his tender:—

Held, that there was a sufficient consideration for the defendant's promise to supply the goods, although there was no binding contract on the part of the company to order any.

The first count of the declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should supply and sell and deliver to the plaintiffs at Doncaster station, and that the plaintiffs should buy and accept of him, any quantity they might require and order of him during a period ending on the 31st of October, 1872, of certain descriptions of iron, at certain prices agreed on between them; that all things were done and happened and existed, and times had elapsed, to entitle the plaintiffs to a performance by the defendant of his agreement and to maintain the action for the breach by him of the same as thereinafter alleged; yet that the defendant did not nor would supply and sell and deliver to the plaintiffs at Doncaster station or elsewhere divers quantities of the said descriptions of iron, which the plaintiffs required and ordered of him during the said period, whereby the plaintiffs were obliged to procure quantities of iron from other persons at higher prices than those to be paid by them as aforesaid, and were otherwise injured.

Second count, that it was agreed by and between the plaintiffs and the defendant that the defendant should supply and sell and deliver to the plaintiffs at Doncaster station, and that the plaintiffs should buy and accept of him, any quantity they might order of him for half the requirements of the plaintiffs during the said period ending on the 31st of October, 1872, of certain descriptions of iron, at certain prices agreed on between them; that all things were done, &c., yet the defendant did not nor would supply and sell and deliver to the plaintiffs, as agreed on as aforesaid, divers quantities of the said descriptions of iron, which the plaintiffs ordered of him for half the requirements of the plaintiffs during the said period ending the 31st of October, 1872, whereby the plaintiffs were obliged to procure quantities of iron from other persons at higher prices than those to be paid as aforesaid, and were otherwise injured. Claim, 2000*l.*

Pleas: 1. That it was not agreed by and between the plaintiffs and the defendant, as alleged; 2. That the plaintiffs did not require or order iron as in the declaration alleged.

There was also a demurrer to each count of the declaration, on the ground that it disclosed no consideration for the defendant's promise to supply the iron therein mentioned. Issue, and joinder in demurrer.

The cause was tried before Brett, J., at the sittings at Westminster after the last term. The facts were as follows:—In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows:—

"I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from the 1st of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side.

(Signed) "Samuel Witham."

The company's officer wrote in reply, as follows:—

"Mr. S. Witham.

"Sir,—I am instructed to inform you that my directors have accepted your tender, dated, &c., to supply this company at Doncaster station any quantity they may order during the period ending 31st of October, 1872, of the descriptions of iron mentioned on the inclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter,

(Signed) "S. Fitch, Assistant Secretary."

To this the defendant replied,—"I beg to own receipt of your

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favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention. S. Witham."

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs,

Nov. 5. *Digby Seymour, Q.C.*, moved to enter a nonsuit, on the ground that the contract was void for want of mutuality. He contended that, as the company did not bind themselves to take any iron whatever from the defendant, his promise to supply them with iron was a promise without consideration. He cited *Lees* v. *Whitcomb* (1); *Burton* v. *Great Northern Railway Co.* (2); *Sykes* v. *Dixon* (3); and *Bealey* v. *Stuart.* (4)

Cur. adv. vult.

Nov. 6. KEATING, J. In this case Mr. Digby Seymour moved to enter a nonsuit. The circumstances were these:—The Great Northern Railway Company advertised for tenders for the supply of stores. The defendant made a tender in these words,—"I hereby undertake to supply the Great Northern Railway Company, for twelve months, from &c. to &c., with such quantities of each or any of the several articles named in the attached specifications as the company's store-keeper may order from time to time, at the price set opposite each article respectively," &c. Some orders were given by the company, which were duly executed. But the order now in question was not executed; the defendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr. Seymour was, that there was no consideration for the defendant's promise to supply the goods; in other words, that, inasmuch as there was no obligation on the company to give an order, there was no consideration moving from the company, and therefore no obligation on the defendant to

(1) 5 Bing. 34.

(2) 9 Ex. 507; 23 L. J. (Ex.) 184.

(3) 9 Ad. & E. 693.

(4) 7 H. & N. 753; 31 L. J. (Ex.) 281.

supply the goods. The case mainly relied on in support of that contention was *Burton* v. *Great Northern Railway Co.* (1) But that is not an authority in the defendant's favor. It was the converse case. The Court there held that no action would lie against the company for not giving an order. If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand.

BRETT, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you 100*l*.," that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive the 100*l*. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. *Burton* v. *Great Northern Railway Co.* (1) is not at all to the pur-

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(1) 9 Ex. 507; 23 L. J. (Ex.) 184.

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pose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.

GROVE, J. I am of the same opinion, and have nothing to add.

Rule refused.

Attorneys for defendant: *Jacobs, North, & Vincent, for North & Sons, Leeds.*

Nov. 6.

ASHFORTH *v.* REDFORD AND ANOTHER.

Construction of Mercantile Contract—Credit of "from six to eight Weeks."

On a sale of goods, the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks;" and they found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:—

Held,—upon the authority of *Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 530), —that the question was properly left to the jury, and the verdict right.

ACTION by the plaintiff, a commission-merchant at Manchester, to recover the price of certain cotton-wefts sold by him to the defendants, to be paid for in "from six to eight weeks." The sale took place on the 1st of May last, and the action was commenced on the 18th of June.

At the trial before Brett, J., at the last assizes at Manchester, it was objected on the part of the defendants that the action had been brought before the expiration of the agreed period of credit. The learned judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks." The jury found that the action had not been brought too soon; and the learned judge, being of the same opinion, directed a verdict for the plaintiff for 28*l.* 14*s.* 2*d.*

Holker, *Q.C.* (*R. G. Williams* with him), moved for a new trial on the ground of misdirection. The defendants were entitled to a credit for the full term of eight weeks, and the construction of the invoice was for the Court, and ought not to have been left to the jury. The alternative was given in ease of the buyer.

KEATING, J. This is a motion for a new trial on the ground of misdirection. It appears that the defendants agreed to buy goods of the plaintiff, to be paid for in "from six to eight weeks," and that an action was brought for the price after the expiration of six weeks, but before the expiration of eight weeks. Mr. Holker's objection is, that the expression being found in a written instrument, the construction of it was for the Court, and that leaving the question to the jury was a misdirection. I think, however, that he could not be entitled to a rule unless he satisfied the Court that the construction which the jury put upon the contract was an erroneous one. I think my Brother Brett was quite right in leaving the question to the jury as he did. Apart from mercantile understanding, the words grammatically speaking are meaningless. The proper course, therefore, as it seems to me was to leave it to the jury to say whether or not they had acquired any mercantile meaning: and accordingly my Brother Brett asked the question, and the jury answered it by saying that in their opinion the action had not been brought prematurely,—in other words, that the meaning of the contract was not that the defendants should have eight weeks absolutely within which to pay for the goods. A somewhat similar question arose in this Court in the recent case of *Alexander* v. *Vanderzee*. (1) There, the defendant contracted for a quantity of Danubian maize, "for shipment in June and [or] July, 1869." In fulfilment of his contract the seller tendered two cargoes of maize the shipment of which commenced on the 12th and 16th of May, and was completed on the 4th and 6th of June; more than the half of each cargo having been put on board in May. The learned judge left it to the jury to say whether the cargoes in question were "June shipments" in the ordinary business sense of the term; and they found that they were. I entertained some doubt whether the question ought

(1) Law Rep. 7 C. P. 530.

to have been left to the jury; but the rest of the Court thought it was properly a question for them: and the Exchequer Chamber affirmed their judgment, the majority thinking the question was properly left to the jury. Lush, J., said:(1) "The words 'for shipment in June or July' have no definite meaning, whether grammatical or otherwise. They may either mean that the shipment of the grain shall be completed in June or July, or that the whole shall be shipped in those months. I think the opinion of the jury was properly asked." So here, no definite meaning, grammatical or otherwise, can be given to the words "to be paid for in from six to eight weeks." They are words which are found in a mercantile contract; and I do not know how otherwise their meaning can be ascertained than by leaving it to the jury to interpret them. I think there was no misdirection.

Grove, J. I am of the same opinion, though I must confess I have entertained considerable doubt; and the case of *Alexander* v. *Vanderzee* (2) has not entirely removed that doubt. There, as here, the words of the contract had per se no definite or intelligible meaning; and the Exchequer Chamber held that it was properly left to the jury to say what was their true interpretation, inasmuch as they might have a mercantile sense which was intelligible to them. The difficulty, however, here is, to see whether the term "from six to eight weeks" could be a mercantile expression. The question is whether the words are not to be read fortius contra proferentem. But my doubt is not strong enough to induce me to differ from my learned Brethren.

Brett, J. The first question is, whether I ought to have left the question to the jury as I did. It seems to me that I was bound to leave it in either of two ways. If I was bound to construe the contract myself, I should say it meant something fairly between the two extremes. If so, the proper question for the jury was whether the 18th of June was the fair mean. But a phrase, though not grammatically accurate, may have an intelligible mercantile meaning; and it seems to me that *Alexander* v. *Vanderzee* (2) is an authority to shew that the mercantile meaning as distinguished from the grammatical meaning is a question for the jury. There, the words of the contract were, "for shipment in June or July," and a large portion of the grain had been shipped in May. It was left to the jury to say whether the shipment was a June shipment in the ordinary business sense of the term; and the majority of the judges, both in this Court and in the Exchequer Chamber, held that it was correct to leave the question to the jury in that form. I left the question upon this occasion as nearly as possible in the same terms. It seems to me that, upon the authority of that case, it was right to leave that question. If, therefore, the construction of the contract was for me, I think my direction was not wrong; and, if it was for the jury, I think they came to the right conclusion.

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(1) Law Rep. 7 C. P. at p. 534.

(2) Law Rep. 7 C. P. 530.

The rule was moved also on the ground that the verdict was against the weight of evidence. But I cannot say that I was dissatisfied with the verdict; and, as my learned Brothers agree that there was evidence both ways, there is no ground for disturbing the verdict.

Rule refused.

Attorneys for defendant: *Shaw & Tremellan, for P. & J. Watson, Bury.*

CROWTHER *v.* APPLEBY.

Nov. 25.

Witness—Subpœna duces tecum—Attachment for Non-production of Documents.

The Court refused to grant an attachment against a witness for disobedience of an order of the district prothonotary of the Court of Pleas at Lancaster, and of an arbitrator, which required the witness to produce before the latter in London a large number of books and documents belonging to a railway company in Lincolnshire of which he was the secretary and solicitor, and which the directors (who were no parties to the reference) refused to allow him to bring.

THIS action was brought to recover, amongst other claims, moneys due to the plaintiff from the defendant in respect of contracts with the defendant having reference to the construction by the latter of the Louth and Lincoln railway. Down to the month of October, 1871, the plaintiff had been the solicitor to that company, but was about that time succeeded by one F. Sharpley, who

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was then appointed and still is the solicitor and secretary of the company.

Upon the cause coming on for trial at the last Manchester Assizes, it was by consent, together with all matters in difference between the parties, referred to an arbitrator. The order of reference contained the following clause,—"And I further order that the said arbitrator shall be at liberty (if he shall think fit) to examine the said parties to this suit and their respective witnesses upon oath or affirmation; that the evidence of the witnesses of the said parties residing in London shall be taken by the arbitrator in London; and that the said parties do and shall produce before the said arbitrator all books, deeds, papers, and writings in their or either of their custody or power relating to the matters in difference."

The arbitrator having appointed the 9th, 10th, 11th, 12th, and 13th of September for proceeding with the reference, at the rooms of the Incorporated Law Society in Chancery Lane, the plaintiff's attorneys obtained from the district prothonotary of the Court of Pleas at Lancaster an order directing Mr. Sharpley to appear before the arbitrator on the 11th of September to be examined as a witness for the plaintiff, and to produce before the arbitrator the minute and all other books containing the proceedings of the Louth and Lincoln Railway Company in the years 1870, 1871, and 1872.

The order and appointment having been duly served upon him, Mr. Sharpley on the 6th of September wrote to the plaintiff's attorneys, as follows:—

"*Crowther* v. *Appleby.*

"With reference to the subpœna you have had served upon me herein, I beg to inform you that the directors of the Louth and Lincoln Railway Company refuse to authorize me to produce the books or other documents of the company. I am ready to attend on my subpœna and give any evidence that may be required, so far as my knowledge goes, of the matters in dispute."

The plaintiff thereupon, on the 9th of September, obtained from the arbitrator an order to the following effect,—"That the said F. Sharpley do attend before me at the Law Institution, Chancery

Lane, London, on the 11th and 12th days of September instant, at 10 o'clock in the forenoon of each of such days, and that he do then and there submit to be examined upon his oath on behalf of the plaintiff in the matter of this reference; and that he do also then and there produce before me the minute and all other books containing the proceedings of the Louth and Lincoln Railway Company in the years 1870, 1871, and 1872, between the said company and the parties to the said reference or either of them,—a contract between the Louth and Lincoln Railway Company and the defendant, dated the 13th of June, 1871, for constructing the said railway,—receipts for all moneys paid by the said company or on its behalf during the years 1870, 1871, and 1872,—all letters written by the defendant to the said company or to any of the directors thereof relating to the matters in question between the parties to this reference during the said years 1870, 1871, and 1872,—also all drafts, agreements, and conveyances relating to the land taken or purchased by the said railway company during the years aforesaid for the purposes of the said railway, and all certificates and authorities for payment of money given by the engineer of the said company during such last-mentioned years,—numerical register, registration-book, ledger, journal, cash-book, minute-book, transfer-book, shareholders' address-book, and all other books and papers containing lists of shareholders kept or used by the said railway company during the years 1870 and 1871."

Mr. Sharpley attended before the arbitrator on the 11th of September, and, being asked if he produced the documents referred to in the before-mentioned orders, or any of them, replied that the directors of his company refused to allow him permission to produce them.

R. G. Williams, on a former day in this term, upon an affidavit setting forth the above facts and stating that Mr. Sharpley "as such solicitor and secretary to the Louth and Lincoln Railway Company would have and had had, and still had, the custody of the books, documents, and papers connected with the said railway and belonging to the said company," obtained a rule nisi for an attachment against him for disobedience of the above orders.

R. V. Williams shewed cause.

[BRETT, J. What authority has this Court to issue an attachment against a witness for disobedience of an order of the district prothonotary of the Court of Pleas at Lancaster, which has not been made a rule of this Court? (1)]

The 3 & 4 Wm. 4, c. 42, s. 40, gives power to a superior Court to compel the attendance of witnesses before an arbitrator and the production of documents by them: and ss. 6, 7, and 13 of the Common Pleas at Lancaster Amendment Act, 1869 (32 & 33 Vict. c. 37), and the Rules made in pursuance of that statute, will be relied upon as giving the district prothonotary power to make the order in question and this Court the power to enforce it. But, assuming the power to exist, Mr. Sharpley is not shewn to be in contempt. He is a mere servant of the Louth and Lincoln Railway Company, and they refuse to allow him to produce their books. If in defiance of their prohibition he did produce them, he might subject himself to an action at their suit, or at all events they might discharge him from their service: and that is a dilemma in which this Court will not place him. In *Attorney General* v. *Wilson* (2), a witness, a partner in a bank, was required under a subpœna duces tecum to produce all books and accounts in his custody or power containing any entries relating to 6500*l.* Consols, or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit: and it was held by Vice-Chancellor Shadwell that the witness was not compellable to produce any books and accounts, because the language of the subpœna was too general, and because the books and accounts relating to the stock were partnership property, and his co-partners would not consent to his producing them. "In the first place," said his honor, in giving judgment (3), "the subpœna is too general for the Court to give effect to it; and, in the next place, it not only does not appear that Mr. Blayds has the documents in his possession or power, but it does most satisfactorily appear that, if I were to make the order, it could not be complied with; because the two Messrs. Beckets, the partners with Mr. Blayds, would not allow the production of the documents." That

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(1) See *Coston* v. *Blackburn*, Law Rep. 8 Q. B. 54.

(2) 9 Sim. 526.

(3) 9 Sim. at p. 530.

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case was acted upon in the recent case of *Lee* v. *Angas* (1). In *Amey* v. *Long* (2), where the defendant, a sheriff's officer, was sued for not having in obedience to a writ of subpœna duces tecum produced at the trial of a former action the warrant under which he had acted, in consequence of which the then plaintiff was nonsuited, the fact of the warrant having been filed in the office of the under-sheriff was held to be a sufficient excuse for its non-production by the officer; "no man being obliged," as Lord Ellenborough (3) said, "according to any sense of the effect of such a subpœna, to sue and labour in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself in obedience to the subpœna."

[DENMAN, J. Where documents are in the possession of a company, who but the secretary can be subpœnaed to produce them?]

The books and papers in the office of the company are no more in the possession and power of the secretary or solicitor than in that of any other clerk of the company. He has no statutory position. All that can be said is that he has access to them for the performance of his duties. At all events, this order is too vague and general.

R. G. Williams, in support of the rule. The only mode of obtaining the production of documents by a public company is by serving their secretary with a subpœna duces tecum. It is true that the plaintiff might have resorted to a bill of discovery: but that has never been held to be a legal answer. "It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness:" 1 Arch. Pr. 11 ed. 353.

[KEATING, J. How is the witness to get these books and documents for the purpose of bringing them up to London, if the directors desire him not to take them?]

In *Amey* v. *Long* (4) Lord Ellenborough in his summing up said: "The only question here to be considered is, whether the defendant had the warrant in his custody, with the capacity of producing it. If it was in his power to have done so, and he did not, it is not to be endured that, by any contrivance between him and G., necessary evidence should be withheld, and the purposes of justice should be defeated."

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(1) Law Rep. 2 Eq. 59.
(2) 9 East, 473.
(3) 9 East, at p. 483.
(4) 1 Camp. 14, 18.

[COLERIDGE, C.J. That stops far short of what you must contend for here. Lord Ellenborough does not say that the witness is bound to produce the document when the legal owner forbids him to do so.

BRETT, J. It is one thing to say that the witness may be liable to an action; but it is very different to punish him for contempt.]

The granting of an attachment no doubt is in the discretion of the Court. In *Lee* v. *Angas* (1), the witness was ordered to produce the documents.

[DENMAN, J. In *Earl Falmouth* v. *Moss* (2), where the steward of the plaintiff was served with a subpœna duces tecum, and called upon to produce leases, &c., of his employer, it was ruled that documents in his custody in his capacity of steward were in the possession of his employer, and therefore not affected by the subpœna. And see *Doe* d. *Wyndham* v. *Date* (3), and *Austin* v. *Evans*. (4)]

COLERIDGE, C.J. This is a rule calling upon Mr. Sharpley to shew cause why an attachment should not issue against him for not producing before an arbitrator, pursuant to an order of the Manchester district prothonotary of the Court of Pleas at Lancaster, a large number of books and documents the property of the Louth and Lincoln Railway Company, which are suggested to be in his possession or power as the solicitor and secretary of that company, which books and documents the directors refuse to allow him to produce. Assuming that we have power to enforce such an order in this way, this is clearly an application to the discretion of the Court: and I think we should do wrong if we made the rule absolute. Mr. Sharpley is the solicitor and secretary of the company. The books and documents which the order requires him to produce are sought to be made evidence in a matter to which the company are not parties; and they object to their production. It seems to have been held in two cases in equity,—*Attorney-General* v. *Wilson* (5) and *Lee* v. *Angas* (1),—that the production of documents by a witness would not under similar circumstances be enforced there. In the former of those cases Vice-Chancellor Shadwell refused to compel a partner in a bank to produce, upon a subpœna duces tecum, books and accounts of the firm, in a suit to which they were no parties, where his co-partners refused to consent to his producing them. That seems to me to be an à fortiori case; and Lord Hatherley adopted and acted upon it in *Lee* v. *Angas*. (1) Lord Ellenborough in *Amey* v. *Long* (2) took very much the same view in the case of a servant. Upon these authorities, as well as upon the reason of the thing, I come to the conclusion that we ought not to attach the witness in the present case. Mr. Sharpley has not the books and documents in his possession otherwise than as the servant of the company, and without their authority or consent he could have no right to remove them from their proper place of custody and bring them up to London. I give no opinion as to whether or not an action would lie against the witness for not obeying the order. It is enough, in order to dispose of this rule, to say that this is not a case in which the Court would order an attachment.

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(1) Law Rep. 2 Eq. 59.

(2) 11 Price, 455.

(3) 6 Jur. 990.

(4) 2 M. & G. 430.

(5) 9 Sim. 526.

KEATING, J. I am of the same opinion.

BRETT, J. Assuming that this Court can issue an attachment for disobedience of an order of the district prothonotary,—which may be somewhat doubtful,—the question is whether the circumstances disclosed in this case warrant us in pursuing that extreme course. This is not the case of a document in Court in the possession of a servant, who refuses to produce it. If it had been, I think he would have been bound to produce it. But here, the documents are not in the possession of the witness; and neither he nor his employers are parties to the litigation. Mr. Sharpley has no statutory position, as has been observed; he is nothing more than the servant of the directors or of the company. The question then is, whether a servant is liable to an attachment for refusing to bring up documents where his masters expressly refuse to allow him to do so. In *Attorney-General* v. *Wilson* (3), Vice-

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(1) Law Rep. 2 Eq. 59.

(2) 9 East, 473.

(3) 9 Sim. 526.

Chancellor Shadwell distinctly laid it down that a partner in a bank could not be compelled to produce under a subpœna duces tecum the books and accounts of the firm, where his co-partners refused to consent to his doing so. The authority of the party to act there was only that of an agent for a principal. That case is an authority to shew that an agent will not be attached for such disobedience: and it follows that a mere servant cannot be.

DENMAN, J., concurred.

Rule discharged, with costs. (1)

Attorneys for plaintiff: *Hutton & Lister, Manchester.*
Attorneys for defendant: *Brooksbank & Galland.*

Nov. 20.

HOBBS, APPELLANT; DANCE, RESPONDENT.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*New Building—Statement of Case under* 20 & 21 *Vict. c.* 43.

A stable in a yard at the rear of the respondent's premises was pulled down, and re-erected, of smaller superficial dimensions, but somewhat higher, in another part of the same yard, the old materials with some addition, and the boundary walls of the yard, being made use of in such re-erection:—

Held,—reversing the decision of the justices,—that this was a "new building" within the Local Government Act, 1858, and the bye-laws of the local board.

Held, also, that the question was properly raised as a question of law for the opinion of the Court.

CASE stated by justices under 20 & 21 Vict. c. 43.

1. An information preferred by the appellant against the respondent under the bye-laws made by the Tonbridge Local Board under the provisions of the Local Government Act, 1858 (21 & 22 Vict. c. 98), and the Acts incorporated therewith, alleging that the respondent, on or about the 15th of March, 1872, in the parish of Tonbridge, unlawfully did erect a certain new building on certain premises in his occupation within the district of the Tonbridge Local Board, without having given such notice of his intention to erect the same, and without having deposited at the office of the local board such plan as is provided for by the bye-laws in that

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(1) See *Coston* v. *Blackburn*, Law Rep. 8 Q. B. 54.

behalf duly made, confirmed, and published by the local board, and which bye-law was, at the time of the commission of the offence and still remained, in force, &c.

2. The bye-laws bearing on the case were Nos. 10, 11, 17, 32. By No. 10 it was provided, that "the external and party or side walls of every new building shall be constructed of brick, stone, or other hard and incombustible substances, unless the local board shall otherwise allow, in cases in which it may appear to them that no danger would exist of the spread of fire." No. 11 provides that "the roof or flat of every new building, and every gutter, dormer, or other work or construction connected therewith, except the doors, door-frames, windows, and window-frames of such dormer and other construction, shall be formed of or externally covered with incombustible materials, except in special cases when otherwise allowed by the local board." And No. 32 provides that "every person who shall intend to erect any new building shall give a fortnight's notice of such intention, by writing delivered to the surveyor or left at the office of the board, and shall at the same time leave or cause to be left at the said office a block plan shewing the position of the buildings and appurtenances of the properties immediately adjoining, the width and level of the street, the level of the lowest floor of the intended building and of the yard or ground belonging thereto. The plan shall also shew the proposed lines of house drainage, and their size and inclination."

3. The appellant is the surveyor to the Tonbridge Local Board. The respondent is a saddler and harness-maker occupying a house and shop in the High Street of Tonbridge, in the rear of which is a small yard in which lately stood a small building used as a stable. The back of this building was formed of a wall which forms the boundary of the yard on the north side; the other three sides of the building were constructed of wood. The dimensions of the building were about 11 feet 6 inches by 8 feet, and the height about 7 feet 8 inches. In February, 1872, the appellant informed the respondent that, if he intended to alter his stable, he must give notice to the board and send in a plan of the proposed alterations, and shortly after handed to the respondent a copy of the bye-laws. On the appellant's inspecting the premises shortly afterwards, he found that the old building, with the exception of the wall which

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formed the back of it, had been removed bodily, and a portion of it re-erected in another part of the yard, but one side of the present building being placed on part of the foundation of the previous building. The size of the new building as altered is 6 feet 6 inches, by 7 feet 6 inches. The back of this building is formed of another wall (the west wall of the yard), which runs at a right angle to the north wall, which, as already mentioned, formed the back of the old building: a second side is formed of the southern boundary wall of the respondent's premises; and the other two sides of the present building are constructed of the materials used in the previous building, which had simply been removed, having an end cut off, and thereby also shortening the frontage. The walls forming two sides of the new building have been raised by additional tiers of bricks,—the west wall to the extent of 3 feet 1 inch. The roof has also been raised to the additional height of 11 inches; and the two sides (one constructed of wood and the other formed of the raised wall on the south side) are also proportionately higher, so that the roof of the present building is somewhat higher than that of the previous one. The roof of the present building is of felt, laid on the old roof. The present building covers a smaller superficial space than the previous one did.

4. On the part of the respondent it was contended that the erection in question was not a new building within the meaning of the Act, inasmuch as it was built in great part of the materials which formed a part of the old stable, and was merely removed from one side of a small yard to the other, and was therefore a re-erection; and that advantage was taken of the two walls referred to, which had been built many years before the local board of Tonbridge was formed, by erecting the building in question on those walls, thus causing them to form part, viz. two sides, of the building in question.

5. On the part of the appellant it was, on the other hand, contended that the building was a new building, as contemplated by the Act and the 32nd bye-law, inasmuch as it was erected on a different site in the yard, and considerable alterations must have been made in its construction, occupying as it did less superficial space, and being of a different shape and of different dimensions to the old building, and from the fact of new materials being partly

used in its construction, and its being made some feet higher than the old building, by the addition of ten courses of bricks, and that the respondent had, by erecting without the approval of the local board a new building of the materials he had employed in its construction, offended also against the 10th and 11th of the bye-laws.

6. The justices, however, were of opinion that the building in question was not a new building within the meaning of the Act and bye-law, and dismissed the complaint.

The question of law for the opinion of the Court was, whether the building in question was a new building within the meaning of s. 34 of 21 & 22 Vict. c. 98, and the 32nd bye-law.

F. M. White, for the appellant. The question is whether the erection described in the case was a "new building," within s. 34 of the Local Government Act, 1858, (21 & 22 Vict. c. 98). That section enacts that "every local board may make bye-laws with respect to the following matters," among others, "(2.) With respect to the structure of walls of new buildings for securing stability and the prevention of fires;" and it goes on, "and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: provided always that no such bye-law shall affect any building erected before the date of the constitution of the district. But, for the purposes of this Act, the re-construction of any building pulled down to or below the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building." The building in question was clearly a "new building" within that section: it is not the less a new building because a portion of the support of the structure consists of the old fence walls, and because the old materials were used in its erection.

W. G. Harrison, for the respondent. Whether or not this was a new building was a question of fact, an appeal from the magistrate's decision of which cannot be entertained by the Court: *Newman* v. *Baker*. (1) There, a magistrate having, upon the construction of rule 5 of s. 26 of the Metropolitan Building Act, 1851 (18 & 19 Vict. c. 122), decided that a certain place, being a row of houses forming part of a line of thoroughfare was a street, this Court refused to interfere. It is only questions of law that the Courts can deal with on appeals under 20 & 21 Vict. c. 43.

[COLERIDGE, C.J. What is meant by "new building" in the Act surely must be a question of construction for the Court.]

The case shews a mere change of the form of the building, with a slight increase of altitude. Degree is essentially a question of fact upon which the statute makes the decision of the magistrate final.

[DENMAN, J. If the magistrates say that this structure could not possibly have been a new building, surely that is a question which it is competent to us to entertain. And that is clearly what they mean.]

Green v. *Pensam* (2) and *Tucker* v. *Rees* (3) were also cited.

White, in reply, referred to *Shiel* v. *Sunderland, Mayor &c.* (4) The question there was whether a certain erection was a new building or merely an addition to an old one; and Bramwell, B., in giving judgment, said (5): "As to the 11th bye-law, it appears to me that this building is a dwelling house; that being a matter of fact which the justices have found. But, is it a new dwelling house, or part of the old one? If the justices had found this distinctly upon the authority of *Newman* v. *Baker* (1) I think we could not have reviewed their decision. But I think the justices have not determined this as a question of fact, but have referred it to us, because they say 'We were of opinion that the building erected in the yard, being a new building built up and adjoining the old one, must either be considered with the old building as one house, or that the old house and the new erection must be considered as two erections.' Thus they say, assuming this to be a new building or an addition to an old building, the appellant was properly convicted. In that they are wrong. So far as the question is referred to us, I think that this was an addition to the old building, and not a new building. The bye-law here does not apply when the new erection is a mere addition to an old building; and this erection is either an addition to the old house, or the justices have not found the fact which is essential to the validity of the conviction."

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(1) 8 C. B. (N.S.) 200.

(2) 22 Just. of P. 737. Lord Campbell in that case said: "I consider this a most beneficial statute; but it only gives the justices the power of asking the opinion of the Court upon a point of law. The question for us is, not whether the justices came to a right conclusion, but whether there was any evidence to support that conclusion."

(3) 7 Jur. N. S. 629.

(4) 6 H. & N. 796; 30 L. J. (M. C.) 215.

(5) 6 H. & N. at p. 806.

COLERIDGE, C.J. This is a case stated by the magistrates of Tonbridge for the opinion of this Court. The respondent had erected a building upon premises in his occupation within the district; and an information was preferred against him for a violation of a bye-law of the local board which provided that any person who shall intend to erect any new building shall give a fortnight's notice of such intention, and shall comply with certain other requirements. The respondent had given no notice. The justices dismissed the information; but they have referred the matter to us, setting out the facts and the arguments urged before them upon the one side and upon the other. The justices decided in favour of the respondent on the ground that the building complained of was not a "new building;" and the question of law which they reserve for the opinion of the Court is, whether the building was a new building within the meaning of s. 34 of 21 & 22 Vict. c. 98, and the 32nd bye-law. Now, the 34th section provides that every local board may make bye-laws, amongst other things, "with respect to the structure of walls of new buildings, for securing stability and the prevention of fires." The definition of "new building" is given in the latter part of the section, which provides that, "for the purposes of this Act, the re-constructing of any building pulled down to or below the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwel-

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ling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building." If the question so left was one which could be reserved for us under 20 & 21 Vict. c. 43, I entertain no doubt whatever that this was a new building within the meaning of the Local Government Act and the bye-law, and that the decision of the justices was wrong. It was suggested by Mr. Harrison that, this being a pure question of fact, and not one of law, we are precluded from entertaining it; and that, if the facts upon which the decision of the justices proceeded are not found, all that we can do is to send the case back to them; and he mainly relied upon *Tucker* v. *Rees.* (1) When that case is looked at, however, it will be found to be altogether different from the present. The question there was, what was a new street within the meaning of the Metropolitan Building Act. It has nothing whatever to do with the point now before us. But the case of *Shiel* v. *Sunderland, Mayor, &c.* (2) was a decision upon the very question what is a new building within the statute now under consideration. All the facts were set out; and the judgment proceeded on the ground that the justices had not found the fact which was essential to support the conviction. Thus, the Court did consider the very point which Mr. Harrison says that we are precluded from entertaining. So, here, the justices ask us, as a question of law, whether upon the facts they have found this erection was a new building within the statute and the bye-law. The facts they have found are these:—The respondent occupies a house in the rear of which is a small yard in which lately stood a small building used as a stable, the dimensions of which were 11 feet 6 inches, by 8 feet, and the height about 7 feet 8 inches. In February, 1872, the respondent took down this erection and constructed another partly on a different spot, using the old materials and some new ones; the dimensions of the new structure being 6 feet 6 inches by 7 feet 6 inches, with a height of 8 feet 7 inches. The whole building, therefore, is substantially different from that which before existed. I cannot see how the justices could upon these facts come to any other conclusion than that this was in the plain ordinary sense and meaning of words a new building. If so, it is

(1) 7 Jur. (N.S.) 629.

(2) 6 H. & N. 796; 30 L. J. (M. C.) 215.

a reasonable thing that a building of this description should be erected in this place under the control provided by the statute. The decision of the justices, therefore, in my opinion, ought to be reversed, but, under the circumstances, without costs.

KEATING, J. I am of the same opinion. If Mr. Harrison could have satisfied us that what the magistrates had referred to us was purely a question of fact, we could not have entertained it, the statute 20 & 21 Vict. c. 43, s. 2, merely enabling them to take the opinion of a superior Court upon a question of law. But I am of opinion that the magistrates did not intend to refer to us a question of fact. What they have referred to us is whether, looking at the Act of Parliament and the bye-laws, the structure in question was a new building within the meaning of the Act. This is a thing that is quite within the mischief of the Act: and the facts stated do in my opinion shew that it is a new building within the Act.

BRETT, J. The facts found are that the old stable was taken down and with the addition of some new materials set up again in part in another part of the yard. Substantially it was a new building set up on a new site. That being the state of things, the magistrates say that the term "new building" in the 32nd bye-law does not apply to the building so set up, because it was built in great part of the old materials, and merely removed from one part of the yard to another. In substance they say that, according to their interpretation of the Act, this was not a new building within it; and they ask us if that is a correct interpretation. The case is very much the same as that of *Shiel* v. *Sunderland*. (1) Our answer to the question of law is that, upon the true interpretation of the Act, the 32nd bye-law did apply to the building so reconstructed.

DENMAN, J. I am of the same opinion. If the magistrates meant to say that they found as a fact that the building in question was not a new building, I should incline to think that we ought

(1) 6 H. & N. 796; 30 L. J. (M. C.) 215.

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not to interfere, though I might have differed from them in opinion. But that is evidently not what they meant to say. They meant to say that such a building as they have described could not in point of law be a new building. I think it could.

Decision reversed.

Attorneys for appellant: *Prior, Bigg, Church, & Adams, for Gorham & Warner, Tonbridge.*

Attorneys for respondent: *Gole & Turner, for Palmer, Tonbridge.*

Nov. 20.

BORRIES AND ANOTHER *v.* THE IMPERIAL OTTOMAN BANK.

Principal and Agent—Set-off against Principal of a Debt due from Agent—Pleading—Means of Knowledge.

4 Ch. D. 136

In order to constitute a valid defence within the rule in *George* v. *Clagett* (7 T. R. 359), the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued.

It is not necessary in such a plea, to negative "means of knowledge," that the seller was dealing as an agent.

To a count for goods sold and delivered, the defendants pleaded, that the goods were sold and delivered to them by S., then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that S. sold the goods in his own name and as his own goods with the consent of the plaintiffs; that, at the time of the sale, the defendants believed S. to be the owner of the goods, and did not know that the plaintiffs were the owners of or interested therein, or that S. was agent; and that, before the defendants knew that the plaintiffs were the owners of the goods or that S. was agent in the sale thereof, S. became indebted to the defendants, &c., claiming a set-off.

Replication, that, before the sale by S., the defendants had the *means of knowing* that he was merely apparent owner of the goods and that the same were intrusted to him as agent, and that S. was agent, and as such sold the goods to the defendants:—

Held, that the plea was good, and the replication no answer to it.

THE second count was for goods sold and delivered, money received by the defendants for the use of the plaintiffs, and interest.

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Fifth plea, as to so much of the second count as related to money payable for goods sold and delivered by the plaintiffs to the defendants, that the goods were sold and delivered to the defendants by certain persons known and carrying on business as Scheitlin & Co., then being the agents of the plaintiffs in that behalf and intrusted by the plaintiffs with the possession of the goods as apparent owners thereof; that Scheitlin & Co. sold and delivered the goods in their own name and as their own goods, with the consent of the plaintiffs; that, at the time of the sale and delivery of the goods, the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of the goods or of any of them, or were interested therein or in the said sale thereof, or that Scheitlin & Co. were agents in that behalf; that, before the defendants knew that the plaintiffs were the owners of the goods or any of them, or interested therein, or that Scheitlin & Co. were agents in the sale thereof, Scheitlin & Co. became, and at the commencement of the suit were and still remained indebted to the defendants in an amount equal to the plaintiffs' claim, as the drawers of certain dishonored bills of exchange which had been refused acceptance by the drawees, and for goods bargained and sold by the defendants to Scheitlin & Co., and for work done, &c., &c.,—which amount the defendants were willing to set off against the plaintiffs' claim.

Second replication to the fifth plea,—that, before and at the time when the goods were so sold and delivered to the defendants as in the plea mentioned by the persons known as Scheitlin & Co. to the defendants, they the defendants had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin & Co. as agents of and for the plaintiffs, and that Scheitlin & Co. were agents of and for the plaintiffs, and as agents of and for the plaintiffs sold and delivered the goods to the defendants.

Third replication to the fifth plea,—that, before and at the time when the goods were so sold and delivered to the defendants as in the plea mentioned by Scheitlin & Co., they the defendants had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin

& Co. as agents, and that Scheitlin & Co. were agents and as agents sold and delivered the goods to the defendants.

Demurrer to the fifth plea, on the ground that it did not allege that the defendants had not the means of knowledge that Scheitlin & Co. were acting in the sale as agents. Joinder.

Demurrers to the second and third replications to the fifth plea, on the ground that, inasmuch as the defendants acted in the bonâ fide belief that Scheitlin & Co. were the owners of the goods, and did not know that Scheitlin & Co. were acting in the sale as agents, it was immaterial whether they had such means of knowledge as alleged. Joinder.

Udall, for the plaintiffs. The plea merely alleges that the defendants did not know that the plaintiffs were the owners of the goods or that Scheitlin & Co. were agents. It ought to have gone on to aver that they had not the means of knowing those facts: see the precedent in Chitty, jun. on Pleading, 3rd ed. 514. Smith's Mercantile Law, 8th ed. p. 152, contains a correct exposition of the law upon this subject. "The principal's right to enforce contracts made by his agent is subject," it is said, "to this rule, viz. that, if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against his agent had that agent really been a principal. Thus, when a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and, though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This rule is to prevent the hardship under which a purchaser would labour, if, after having been induced by peculiar considerations, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. But if, at any time in the course of the transaction, he have *means of knowing*

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that the person with whom he deals is not a principal, the above reason does not apply, and then cessante ratione cessat ipsa lex." For this the author cites *Coates* v. *Lewes* (1); *Sims* v. *Bond* (2); *Bastable* v. *Poole* (3); *Stracey* v. *Deey* (4); *George* v. *Clagett* (5); *Blackbourne* v. *Scholes* (6); *Carr* v. *Hinchliff* (7); *Taylor* v. *Kymer* (8); *Warner* v. *M'Kay.* (9) So, in the notes to *George* v. *Clagett* (5) in 2 Smith's Leading Cases, 6th ed. p. 115, it is said that "This rule only applies where the party contracting has not *the means of knowing* that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing not with a principal but with an agent, the reason of the above rule ceases;"—citing *Baring* v. *Corrie.* (10) And at p. 117 it is said that, "In order to make a valid defence within the rule laid down in the principal case, the plea must shew that the contract was made with a person whom a plaintiff had intrusted with the possession of the goods, that that person sold them as his own, in his own name, as principal, with the authority of the plaintiff, that the defendant *dealt with him as and believed him to be the principal in the transaction,* and that, before the defendant was undeceived in that respect, the set-off accrued." For this reference is made to the judgment of this Court in *Semenza* v. *Brinsley.* (11) In *Purchell* v. *Salter* (12) the plea contained the averment in which this plea is deficient. The plea as here pleaded is consistent with the defendants' having had notice, and having forgotten it; as in *Raphael* v. *Bank of England.* (13)

[BRETT, J. It is consistent with this plea that the debt sought to be set off was contracted before Scheitlin & Co. were intrusted with the goods. How is the fact?]

It may be assumed to have accrued before this claim arose.

[KEATING, J. Is "means of knowing" anything more than evidence of knowledge?]

(1) 1 Camp. 444.
(2) 5 B. & Ad. 389.
(3) 1 C. M. & R. 410.
(4) 7 T. R. 361, n. (c).
(5) 7 T. R. 359.
(6) 2 Camp. 341.
(7) 4 B. & C. 547.
(8) 3 B. & Ad. 320.
(9) 1 M. & W. 591.
(10) 2 B. & Ald. 137.
(11) 18 C. B. (N. S.) 467; 34 L. J. (C. P.) 161. 11 Jur NS 407
(12) 1 Q. B. 197.
(13) 17 C. B. 161; 25 L. J. (C.P.) 33.

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The substantial question is whether or not the defendant had means of knowledge.

[COLERIDGE, C. J. I observe that Lord Denman, in giving judgment in *Purchell* v. *Salter* (1), in the Court below, when he states the substance of the plea omits all mention of "means of knowledge."

DENMAN, J. In the third edition of Bullen and Leake, p. 688, there is a form of plea which omits the words you contend ought to be inserted; and in a note appended thereto, referring to *Baring* v. *Corrie* (2), it is said: "If the buyer had the means of knowing him to be dealing as an agent, and negligently omitted to inform himself, it would be equivalent to knowledge, and would deprive him of the set-off."]

Those words *are* found in the same form in the second edition, which is referred to in the argument in *Semenza* v. *Brinsley*. (3) It is submitted that the plea is bad, and the replications good.

Holl, contrà. The plea is in the form given in the 3rd edition of Bullen and Leake, p. 688, and in 3 Ch. Pl. 17th ed. p. 122, and adopted in *Carr* v. *Hinchliff* (4), *Fish* v. *Kempton* (5), *Dresser* v. *Norwood* (6), and other cases. The real question after all is, whether the defendants knew that they were dealing with an agent. In *Rabone* v. *Williams* (7), Lord Mansfield said: "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." And in *George* v. *Clagett* (8) Lord Kenyon and the rest of the Court, upon the authority of that case held that, if a factor who sells under a del credere commission sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

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(1) 1 Q. B. at p. 200.

(2) 2 B. & Ald. 137.

(3) 18 C. B. (N.S.) at p. 472.

(4) 4 B. & C. 547.

(5) 7 C. B. 687; 18 L. J. (C.P.) 206.

(6) 17 C. B. (N.S.) 466; 32 L. J. (C.P.) 201.

(7) 7 T. R. 360, n. (*a*).

(8) 7 T. R. 359.

[BRETT, J. The marginal note is not strictly accurate.]

The passage cited from 2 Smith's Leading Cases, 6th ed. 115, is not inconsistent with the authorities. In *Baring* v. *Corrie* (1), the Court came to the conclusion that the defendant had knowledge of the fact. Abbott, C.J., says (2): "The distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal: the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name." And further on he says (3): "There is another circumstance which shews that, if they (the defendants) did not know that Coles & Co. were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale-note, and were not required to sign a bought-note. Now, without entering into the question whether or not under such circumstances the bargain could be enforced, it is quite sufficient to say that the ordinary course of dealing was not pursued, and that enough appears to shew that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed." And Bayley, J., said (4): "I think the plaintiffs did not by their conduct enable Coles & Co. to hold themselves out as the proprietors of these goods, and so to impose on the defendants; that the defendants were not imposed upon; and, even supposing that they were, that they must have been guilty of gross negligence."

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(1) 2 B. & Ald. 137.
(2) 2 B. & Ald. at p. 142.
(3) 2 B. & Ald. at p. 144.
(4) 2 B. & Ald. at p. 147.

[BRETT, J. Three reasons seem to have been given for the judgment, any one of which would have been sufficient.]

In *Fish* v. *Kempton* (1), Cresswell, J., says: "This is an attempt to extend the rule laid down in *Rabone* v. *Williams* (2) and *George* v. *Clagett* (3), which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer bonâ fide purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal." These are exactly the terms of this plea.

[BRETT, J. The decision was, that the defendant knew that Tanner & Ward were selling as factors, and therefore he had no right of set-off. The objection here is, that the plea does not sufficiently aver that the defendants had not notice that Scheitlin & Co. were factors.]

It is not necessary to negative notice; it is enough to aver that the defendants bonâ fide believed that the vendors were the true owners of the goods.

[BRETT, J. Suppose at the trial the plaintiffs proved that the defendants had notice, and the jury find that they did not believe it?]

The fact of knowledge cannot depend upon whether the information was true or false.

[COLERIDGE, C.J. Do not the words of the plea convey to any reasonable mind that the defendants had neither notice nor knowledge?

KEATING, J. If notice is proved, the plaintiffs will very likely dispose of the allegation that the defendants had not knowledge.]

Udall was heard in reply.

COLERIDGE, C.J. I am of opinion that our judgment should be for the defendants. The action is brought for goods sold and delivered by the plaintiffs to the defendants. The fifth plea states that the goods were sold and delivered to the defendants by Scheitlin & Co., then being agents of the plaintiffs and intrusted by them with the possession of the goods as apparent owners

(1) 7 C. B. 687; 18 L. J. (C.P.) 206.

(2) 7 T. R. 360, n. (*a*).

(3) 7 T. R. 359.

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thereof; that Scheitlin & Co. sold the goods in their own name and as their own goods with the consent of the plaintiffs; that, at the time of the sale, the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of them or were interested therein, or that Scheitlin & Co. were agents; and that, before the defendants knew that the plaintiffs were the owners of the goods or interested therein, or that Scheitlin & Co. were agents in the sale thereof, Scheitlin & Co. became indebted to the defendants, &c. It was in the first place contended by Mr. Udall that the plea should have averred, not only that the defendants did not know that the plaintiffs were the owners of the goods, and believed Scheitlin & Co. to be the owners, but also that the defendants had not the means of knowledge that Scheitlin & Co. were not owners, but were acting in the sale as agents. It appears to me, however, that the plea states all that is material to raise the defence. It states that the plaintiffs intrusted Scheitlin & Co. with the goods for sale, that they sold them, and that the defendants bought them believing Scheitlin & Co. to be the owners of them. The essence of the defence is, the real state of the defendants' minds when they bought the goods of Scheitlin & Co. They assert that it was this, that they believed the goods to be the goods of Scheitlin & Co., and did not know or believe that the plaintiffs were the owners of or interested in them. That brings the case distinctly within the rule in *George* v. *Clagett* (1); and that is the form of plea which has been commonly in use to raise a defence of this kind. I observe that in two cases,—*Purchell* v. *Salter* (2) and *Semenza* v. *Brinsley* (3),—where the plea contained an averment that the defendant had no means of knowledge, no notice is taken of that allegation in the judgment. If it be necessary to aver that the defendants had not notice that the plaintiffs were the owners of the goods, I think that is substantially averred in this plea by the statement that Scheitlin & Co., with the consent of the plaintiffs, sold the goods as their own, and that the defendants believed them to be the owners of them, and did not know that the plaintiffs were the owners. The plea being good, it follows that the replication,

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(1) 7 T. R. 359.
(2) 1 Q. B. 197.
(3) 18 C. B. (N.S.) 467; 34 L. J. (C.P.) 161. 11 Jur. N. [illegible]

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which merely states that at the time of the sale the defendants had the means of knowing that Scheitlin & Co. were only apparent owners, and were intrusted with the goods as agents of the plaintiffs, is no answer to the plea,—being a mere statement of a fact which was immaterial.

KEATING, J. I am of the same opinion. The argument of Mr. Udall in substance is this, that, in a plea setting up the defence in *George* v. *Clagett* (1), it is not sufficient to allege want of knowledge, without going on to negative that the defendant had the means of knowledge, or notice. It seems to me, however, that this plea contains all that is essential to constitute a good defence. It states that Scheitlin & Co. were intrusted by the plaintiffs with the goods for sale, that Scheitlin & Co. with the plaintiffs' consent sold them in their own names and as their own goods, and that the defendants bought them believing Scheitlin & Co. to be the owners of them, and not knowing that the plaintiffs were the owners or that Scheitlin & Co. were agents in that behalf. I think it was quite unnecessary to go on and aver that the defendant had not notice or means of knowledge; for, if they had means of knowledge, that might be given in evidence under a traverse of the allegation of want of knowledge. For these reasons, I entirely agree with my Lord that the plea is good, and that the replications afford no answer to it.

BRETT, J. The material allegations in the plea are, that the goods were sold to the defendants by Scheitlin & Co., who as agents were intrusted by the plaintiffs with the possession of the goods as apparent owners thereof, and that Scheitlin & Co. sold the goods in their own name and as their own goods with the consent of the plaintiffs, and that at the time of the sale the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of or interested in them, or that Scheitlin & Co. were agents only. The contention on the part of the plaintiffs is, that, assuming these allegations to be true, the plea is bad for not averring that the defendants at the time of the sale had not the means of knowing

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(1) 7 T. R. 359.

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that Scheitlin & Co. were acting in the sale as agents. Assuming the other averments in the plea to be true, such an averment as it is contended ought to appear in it would, as it seems to me, throw upon the purchasers of goods a burthen which the mercantile law never intended should be cast upon them. "Means of knowledge" is so large and comprehensive a term that the defendants might be bound to prove that they could not by inquiry have ascertained that the plaintiffs were the owners of the goods and that Scheitlin & Co. were acting only as agents in the sale of them. That would be manifestly unjust, seeing that the plaintiffs, by intrusting Scheitlin & Co. with the possession of the goods for sale, gave them the opportunity of representing themselves to be the real owners of them. It was further said that the plea is bad for not averring that the defendants had not notice. It is unnecessary to decide that. If it were, I should be prepared to hold that the negation of notice is involved in the affirmative allegation that Scheitlin & Co. sold the goods in their own names and as their own goods, and that the defendants bought them believing Scheitlin & Co. to be the owners and not knowing the plaintiffs to be the owners. But, though it is not necessary, I should incline to go further and to say that, if the replication had expressly averred that the defendants had notice at the time of the sale that Scheitlin & Co. were acting merely as agents, if the allegations in the plea were true that averment would be immaterial. I take the rule of law to have been properly laid down by Willes, J., in *Semenza* v. *Brinsley* (1), where, treating of the facts necessary to be alleged in a plea of this sort, he says, referring to the rule in *George* v *Clagett* (2): "In order to make a valid defence within the rule above stated, it is obvious that the plea should shew that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff, that the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued." In that statement of the law by that very learned judge, neither of the allegations the absence of which is relied on here is alluded to. Mr. Udall's reference to the precedent in Chitty, jun. 3rd ed. p. 514 shews that the extreme caution of the learned editors induced them to put in something which was not absolutely necessary to the validity of the plea. I am of opinion that the plea is good, and the replications bad.

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(1) 18 C. B. (N.S.) at p. 477. (2) 7 T. R. 359.

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DENMAN, J. I am of the same opinion. I think the plea contains all that is essential to constitute a defence. Means of knowledge may be material evidence on the trial. So, the allegation of notice would be merely stating matter of evidence.

Judgment for the defendants.

Attorneys for plaintiffs: *Williamson & Hill, for Ingledew & Daggett, Newcastle-upon-Tyne.*

Attorney for defendants: *Clements.*

Nov. 25.

PHILLIPS *v.* BRIDGE.

Landlord and Tenant—Proviso for Re-entry for Non-payment of Rent—Demand of Payment.

An agreement of tenancy contained the following clause:—This agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, and without any other warrant, authority, or proceedings, to re-enter, &c.:—

Held, that, to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, and a demand (but without the formalities of a common law demand) of payment be then made. A demand within the twenty-one days is insufficient.

EJECTMENT for two rooms on the ground floor of premises situate and being in the rear of No. 8, London Street, in the city of London.

The cause was tried in the Mayor's Court, London. It appeared that the defendant was tenant to the plaintiff of the rooms in question under a memorandum of agreement in the following terms:—

"Memorandum of agreement made this 25th of March, 1870, between Edmund Phillips, of &c., of the one part, and John

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Bridge, of &c., of the other part; that is to say, the said E. Phillips agrees to let and the said John Bridge agrees to take, for a term of five years from the 25th of March, 1870 (determinable by the said John Bridge at the end of the first two years, on giving six months previous notice in writing), all those two rooms, &c., at a clear yearly rent of 80*l.*, payable quarterly, on the usual days of payment, the first quarterly payment thereof to be made on the 24th of June, 1870; . . . . and this agreement is entered into upon the express condition that, if the said John Bridge shall make default in payment of the said rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, become bankrupt, or on breach of any or either of the foregoing stipulations by or on the part of the said John Bridge, it shall be lawful for the said E. Phillips, without giving any notice to quit, and without any other warrant, authority, or proceedings, to re-enter and resume possession of the said rooms, and to put out and expel the said John Bridge therefrom; but without prejudice to the rights or remedies of the said E. Phillips for any such non-payment or breach," &c., &c.

On the 25th of March, 1873, 20*l.* became due to the plaintiff for a quarter's rent. The quarter's rent was demanded or asked for on the 9th of April, but was not paid; and, without any other demand, this action was brought for the alleged forfeiture.

A verdict having been entered for the plaintiff,

Telfourd Salter, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the evidence did not prove a demand in accordance with the terms of the agreement.

Hilbery shewed cause. It may be conceded that the demand here would not be sufficient at common law: see *Kidwelley* v. *Brande*, per Hales, J. (1); note 11 to *Duppa* v. *Mayo*, 1 Notes to Wms. Saund. p. 434. (2) But the terms of the condition here relieve the lessor from the necessity of making any formal

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(1) 1 Dyer, 68, a.

(2) "Where there is a condition of re-entry reserved for non-payment of rent, several things are required by the common law to be previously done by the reversioner to entitle him to re-enter. 1. There must be a demand of the rent: Bro. Demaunde, pl. 19; *Hill* v. *Kempshall* (7 C. B. 975). 2. The demand must be of the precise rent due; for, if he demands a penny more or less, it will be ill: *Fabian and*

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demand: see *Newdigate's Case.* (1) Under this condition or proviso, the lessor was entitled to re-enter, the rent being in arrear for twenty-one days, and having been demanded. The action was not brought until more than twenty-one days had elapsed after the demand.

[Brett, J. Although the demand need not be made with all the formalities of a demand at common law, must it not be made according to the terms of the contract?]

In *Doe* d. *Scholefield* v. *Alexander* (2), the rent was reserved quarterly, and the lease contained a proviso that, if the rent should be unpaid twenty-one days next after any of the days of payment (being lawfully demanded), the lessor might re-enter: and Lord Ellenborough said: "The party stipulates for a demand: he does not stipulate for a demand with all the necessary formalities of the common law; the stipulation does not relate to a demand of such nicety, but only that it shall be lawfully demanded; and I do not see why I must refer that to a demand as upon a re-entry at common law." If, then, a demand as at common law was not necessary, it was enough to make a demand as of an ordinary debt.

[Denman, J. The demand, as it is called, was made before the expiration of the twenty-one days. The words of the proviso are, "If the lessee shall make default in payment of the said rent within twenty-one days after the same shall become due, being demanded,"—not "having been demanded,"—the lessor may

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Windsor's Case (1 Leon. 305; Cro. Eliz. 201). 3. It must be made *precisely upon the day* when the rent is due and payable by the lease to save the forfeiture; as, where the proviso is, 'that, if the rent shall be behind and unpaid by the space of thirty or any other number of days after the days of payment, it shall be lawful for the lessor to re-enter,' a demand must be made on the thirtieth or other *last* day: Co. Litt. 202, a; and Hargreave's note 3; *Hill* v. *Grange* (Plowd. 172, b, 173, a); *Clun's Case* (10 Co. Rep. 129, a); *Kidwelly* v. *Brande* (Plowd. 70, a, b); *Cropp* v. *Hambledon* (Cro. Eliz. 48); *Wood and Chiver's Case* (4 Leon. 180); *Smith and Bustard's Case* (1 Leon. 142); *Kirby* v. *Green* (2 Lutw. 1139). 4. It must be made a *convenient time before sunset:* Ibid.: and see *Tinkler* v. *Prentice* (4 Taunt. 555); *Acocks* v. *Phillips* (5 H. & N. 183). 5. It must be made upon *the land,* and at the most *notorious place* upon it: therefore, if there be a *dwelling-house* upon the land, the demand must be at the front or fore door, though it is not necessary to enter the house, notwithstanding the door be open."

(1) 1 Dyer, 68, a.

(2) 2 M. & S. 525.

re-enter, &c. Does the right of re-entry accrue unless there has been a default for twenty-one days, followed by a demand ?]

A demand within the twenty-one days will clearly satisfy the terms of the condition.

[Brett, J. The rent was due at Lady Day, and an action might have been brought for it the next day. But, one of the conditions of the right of re-entry is, that the rent shall remain due and unpaid for twenty-one days. The question is whether the lessor should not have asked for the rent again after the expiration of the twenty-one days.]

It is submitted that the condition was satisfied by one demand, at whatever time made, provided the twenty-one days of grace were allowed to the tenant.

T. Salter (*J. O. Griffits* with him), in support of the rule. But for the insertion of this clause in the lease, the demand must have been made as at common law. The proviso requires that the demand shall be made after the default, in order that the tenant may know that the landlord means to take advantage of the forfeiture. If it had been intended that the demand might be made at any time, it should have been so expressed, as in the precedent in Woodfall's Landlord and Tenant, 10th edit. 1023, n. where the words used are, " (the same being lawfully demanded at any time during the said —— days or afterwards, and not paid when demanded)." All that the decision in *Doe* d. *Scholefield* v. *Alexander* (1) amounts to is, that " lawfully demanded " and " demanded " meant the same thing. Here, the plain and obvious intention of the proviso is, that, before the right of the lessor to re-enter accrues, the rent shall have been due and unpaid for twenty-one days, and there shall have been a subsequent demand. In *Doe* d. *Dixon* v. *Roe* (2), the lease contained a clause of re-entry " for non-payment of the rent within twenty-one days next after any of the days whereon the same ought to be paid," &c. The rent was due on the 25th of December, 1848, and a declaration and notice in ejectment were served on the 10th of January, 1849, in supposed pursuance of the 4 Geo. 2, c. 28, s. 2. Upon a motion for judgment against the casual ejector, Cresswell, J., said, " The landlord can have no right of re-entry for non-payment of the half-year's rent,

(1) 2 M. & S. 525.

(2) 7 C. B. 134.

the twenty-one days not having elapsed at the time of affixing the declaration and notice."

[DENMAN, J., referred to *Hill* v. *Kempshall* (1), where Maule, J., says: "The tenant should have an opportunity of paying the rent, by having it demanded."]

COLERIDGE, C.J. I am of opinion that this rule should be made absolute. The question turns upon the construction of an agreement which is not expressed in very clear terms. The agreement is for the letting of part of a house for five years from the 25th of March, 1870, at the yearly rent of 80*l.*, payable quarterly; and it is made subject to this condition,—" and this agreement is entered into upon the express condition that, if Bridge shall make default in payment of the said rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, become bankrupt, or on breach of any or either of the foregoing stipulations by or on the part of Bridge, it shall be lawful for Phillips, without giving any notice to quit, and without any other warrant, authority, or proceedings, to re-enter and resume possession of the said rooms, and to put out and expel Bridge therefrom," &c. The facts were these:—A quarter's rent was due at Lady Day, 1873, and on the 9th of April the tenant was asked to pay it, but did not do so. On the 15th of May, the rent being still unpaid, and no other demand having in the meantime been made, this action was brought to recover possession. It has been contended on the part of the tenant that in this action to enforce a forfeiture he is entitled to succeed, because the condition gave him twenty-one days to pay the rent after it became due, and that, to entitle the landlord to avail himself of the covenant, the demand must be made after the expiration of the twenty-one days; and that a demand made before the expiration of the twenty-one days was not such a demand as the agreement contemplated. It seems to me that that is the true construction to be placed upon this agreement. It has been suggested that the words "being demanded" were inserted in the clause of re-entry in order to emancipate the landlord from the necessity of observing all the formalities of a common-law demand. It is, however, unnecessary to consider that; the only

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(1) 7 C. B. 975, 979.

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question for us being whether there was a demand of any kind within the words of the condition. I am of opinion,—though it is quite possible that some other construction may be put upon it,—that the more correct construction of the agreement is that the rent must be due for twenty-one days, and the demand made after the rent has been so due for twenty-one days, as the condition upon which the right to re-enter is to attach. It has been pointed out already that there may be good reasons for that construction, seeing that this is an action for a forfeiture and not for the rent. An action for the rent might have been brought the day after Lady Day. But, when the tenant is to be turned out of possession for non-payment of rent, it is but reasonable that he should have,—and upon these words it seems to me that he has,—the whole of the twenty-one days before he can be said to have been guilty of such a default as to render him liable to an action of ejectment. That seems to me to be tolerably clear both from the words of the agreement and upon such authority as we have been presented with on the argument of the case. The precedent referred to in the note in Woodfall, p. 1023, shews that apt words are in known use where a different result is contemplated: and in substance the matter has already been decided by this Court in *Doe* d. *Dixon* v. *Roe* (1) and *Hill* v. *Kempshall.* (2) In *Doe* d. *Dixon* v. *Roe* (1), it was held that, in ejectment brought upon a right of re-entry, under the 4 Geo. 2, c. 28, s. 2, it must appear that the landlord had a power to re-enter in respect of the non-payment of half a year's rent at the time of affixing the declaration and notice upon the premises: and in the course of the argument Cresswell, J., said, "The landlord can have no right of re-entry for non-payment of the half-year's rent, the twenty-one days not having elapsed at the time of affixing the declaration and notice. The statute says that there shall be half a year's rent in arrear, and that the landlord shall have a right to re-enter for the non-payment thereof." The statute says that, half a year's rent being in arrear, the landlord shall have a right to re-enter. That must be in case of non-payment within the terms of the lease. The tenant has the whole of the twenty-one days within which to pay the rent, before the clause of re-entry can take effect. In *Hill* v. *Kempshall* (2) the lease does not seem to have contained the words "being demanded," which are found in this agreement. The words there were, "If default shall be made in payment of such rent as aforesaid, it shall be lawful for the lessor within twenty-one days to re-enter," &c. The question was whether the lessor could re-enter without a demand. In the course of the argument, Maule, J., asked, "Does the entry of the landlord put an end to the lease?" And, upon being answered in the affirmative, he observed, "Then a demand was requisite." To the suggestion of counsel that "the forfeiture was incurred on the rent being unpaid on the 25th of June; it was a complete forfeiture on the landlord's choosing to avail himself of it;" the learned judge replied, "The tenant should have an opportunity of paying the rent, by having it demanded." If the words "being demanded" had been found there, that would have been a decision precisely in point. Whether, therefore, we look at this agreement apart from authority or by the light afforded by the cases referred to, the true construction of this agreement seems to me to be that it is a condition precedent to the landlord's right to re-enter, that the rent shall be twenty-one days in arrear, and then a demand of payment made. It being admitted here that the only demand was made on the fifteenth day, the condition was not complied with, and this rule must be made absolute.

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(1) 7 C. B. 134.

(2) 7 C. B. 975.

KEATING, J. I am of the same opinion. The agreement between the parties is that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, it shall be lawful for the landlord to re-enter, &c. That stipulation was inserted in substitution for the common-law rights of the parties. Now, the common-law right of the tenant was this, that the landlord could not re-enter without a demand of the rent accompanied by certain very onerous formalities. That being so, the proviso must be read as favourably for the tenant as its words will reasonably admit of. It seems to me that the construction my Lord has put upon it is the correct one. In truth, the meaning is this, We agree to dispense with the common-law demand; but, before the landlord shall be allowed to re-enter for non-payment of the rent, the tenant shall be allowed twenty-one days, and then the landlord

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shall make, not the common-law demand, but a demand. That seems to me to be the more reasonable construction of the proviso.

BRETT, J. The question in this case arises upon the construction of a clause of forfeiture in a lease. The lease seems to have been drawn according to some of the forms known to conveyancers; it is very like that given in Woodfall, p. 1023. And from its being in great part printed it would seem to be a form in common use. The rent was by the lease payable quarterly. On non-payment on any one quarter-day, therefore, the landlord would have an immediate right of action or distress for its recovery. He would also have a right, on the observance of certain strict formalities on the day on which the rent became payable, to proceed under a clause of forfeiture. Then there is a stipulation, in no way interfering with the right of action or distress, but merely modifying the common-law right of re-entry. It provides that, if the tenant shall make default in payment of the rent or any part thereof within twenty-one days after the same shall become due, being demanded, &c., it shall be lawful for the landlord, without giving any notice to quit, and without any other warrant, authority, or proceeding, to re-enter and resume possession, &c. Even if the words "being demanded" had not been found in this clause, *Doe* d. *Dixon* v. *Roe* (1) is an authority to shew that no forfeiture would be incurred until the twenty-one days had elapsed; that is to say, that the tenant, who is already in default for having failed to pay the rent according to the reservation in the lease, would still have time for repentance, so as to avoid the forfeiture. It is made a condition precedent that, before the landlord can exercise his right to avail himself of the forfeiture, twenty-one days must elapse. Now, you have here the words "being demanded" added. Do they modify the preceding words? or do they add another condition? According to the dictum of Maule, J., if those words had not been there, the forfeiture being at the landlord's option, he must do something to shew that he means to exercise that option. He is bound to make a demand at the end of the twenty-one days. I agree that the words of the proviso do alter the strictness of the common-law mode of making the demand. There

(1) 7 C. B. 134.

may be a default as to part of the rent. If part only remained unpaid, it is impossible that there could be a demand according to common law. But these words do not deprive the tenant of the time allowed him for repentance, or take away the limitation of time for the assertion of the will of the landlord. The tenant has, as it seems to me, twenty-one days of grace before the demand can be made. That is the best grammatical construction I can put upon the agreement. If Mr. Hilbery's contention were correct, the words should have been "having been demanded." It appears from the reference to Woodfall that there are apt words in use amongst conveyancers which might have been used here if it had been intended that the demand might be made within the twenty-one days; and that very much strengthens the argument in favour of the construction which we adopt. There is a double condition here: twenty-one days must elapse after the rent has become due, and then there must be a demand, but one which need not be accompanied by the strict formalities of a common-law demand. The demand in the present case did not, I think, give the tenant all the indulgence and protection he was entitled to. If the rent had been demanded again at the expiration of the twenty-one days, he might have paid it. I agree with my Lord and my Brother Keating that this rule must be made absolute.

Denman, J. I am of the same opinion. When the rule was moved, I must confess I thought otherwise; but, after hearing the argument and weighing the authorities referred to, I have come to the conclusion that the true construction of this agreement is that which the rest of the Court have put upon it. It is always satisfactory to find that the most grammatical construction of a document accords with the justice of the case. I think the words of this proviso are more consistent with a demand after the expiration of the twenty-one days than with a demand at any antecedent time, although a period of twenty-one days should have elapsed between that time and the day of bringing the action.

Rule absolute.

Attorneys for plaintiff: *G. Rose, Innes, & Son.*
Attorney for defendant: *C. Butterfield.*

TURNER *v.* GOULDEN.

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Nov. 25.

Practice—Interrogatories under Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 51—*Liability of Valuer for Negligence—Arbitrator.*

The defendant was engaged as valuer on the part of the plaintiff to ascertain the sum to be paid by the latter on the purchase of the goodwill, &c., of a business. In an action against him for alleged negligence and want of reasonable skill in the conduct of the valuation :—

Held, that the plaintiff was entitled, under s. 51 of the Common Law Procedure Act, 1854, to interrogate the defendant as to the basis of his valuation.

Distinction between an arbitrator and a mere valuer.

THIS was an action against a valuer for failing to exercise due and reasonable care and skill in the valuation of a business.

The plaintiff had agreed to purchase the goodwill, stock-in-trade, and fixtures of a bookselling business at Lowestofft, the purchase-money to be "one year's net profits," and the stock-in-trade and fixtures to be taken at a valuation: the estimate and valuation were to be made by two valuers, one to be appointed by each party, and, in the event of a difference, by an umpire. The defendant was appointed to value on behalf of the plaintiff, and one Holmes was appointed by the seller. The valuers met, and agreed upon a sum of 195*l.* for the goodwill, 520*l.* for the stock-in-trade, and 102*l.* 14*s.* for the fixtures.

The suggestion on the part of the plaintiff was, that, before proceeding to a valuation, the two valuers had agreed that the basis of their valuation for the goodwill should be an average of three years' takings; that the seller had given the takings for seven years; and that the valuers had by mistake based their estimate on the first three instead of the last three years.

A summons was taken out calling upon the defendant to shew cause why the plaintiff should not be at liberty to administer interrogatories under s. 51 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), with reference to the mode in which the valuation had been made. (1) On the summons coming on for hearing, Martin, B., referred the matter to the Court.

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(1) The proposed interrogatories were as follows :—

1. Were you not in the month of August, 1872, employed by the plaintiff to value the goodwill, stock, and fixtures of a business at Aldborough, which the plaintiff purchased from one Robert Turner? Did not W. Holmes act in the same matter as valuer for the vendor?

Lumley Smith moved accordingly, relying upon *Jenkins* v. *Betham* (1),—the only difference between which and the present case was that there the defendant was charged with want of skill, here with negligence,—to shew that the action would lie; and he submitted that it followed of necessity that the plaintiff would be entitled to administer the interrogatories in question.

[KEATING, J. *Jenkins* v. *Betham* (1) was the ordinary case of a person holding himself out as possessing a reasonable degree of skill in a profession of which he was found to be unreasonably

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2. Did you not agree with Holmes that the value of the goodwill should be taken at one year's net profits on an average of the then preceding three years? If you say that such basis was not agreed upon by you and Holmes, state what, if any, basis was agreed upon by you and Holmes for fixing the value of the said premises.

3. Did you not agree with Holmes that the average net profits should be estimated for the purpose of fixing the value of the goodwill, by adding together the gross returns for the then preceding three years and dividing the same by three, so as to give the average annual gross returns by taking one third of such annual average gross returns so arrived at as the annual average gross profit, and by deducting from such annual average gross profit so arrived at a certain sum for expenses? If you say that the above basis was not agreed upon by you and Holmes for fixing the value of the said average net profits, state what, if any, was the basis agreed upon between you for fixing the said value.

4. Did you not agree with Holmes that the sum to be deducted from the average annual gross profits in order to arrive at the average annual net profits should be taken at 105*l.* or some other and what sum?

5. Did not you and Holmes fix the value of the goodwill at 195*l.*? and was not such amount arrived at by taking the average annual gross returns at 900*l.*, by taking one third of such sum, or 300*l.*, as the average annual gross profits, and by deducting from such last-mentioned sum the sum of 105*l.* for expenses, and thereby arriving at 195*l.* as one year's average net profits.

6. Did not you and Holmes value the stock-in-trade of the said business at 520*l.*, or some other and what sum?

7. Did not you and Holmes value the fixtures on the premises where the business was carried on at 102*l.* 14*s.* or some other and what sum?

8. Have you or had you lately, and when last, in your possession, custody, or control, or in that of your agent, any books or documents containing any entries or any accounts, memoranda, inventories, valuations, calculations, receipts, letters, telegrams, papers, or writings, or any copies thereof, relating to the matters in dispute in this action? If so, set forth a full and particular list and schedule of them, distinguishing which of the same are in your possession or power and where and in whose possession the others of them are. State whether you object to produce them or any or which of them, and on what grounds.

(1) 15 C.B. 168; 24 L. J. (C.P.) 94.

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ignorant. That is a general principle which is applicable to all trades and professions.]

A. B. Hamilton shewed cause in the first instance. The plaintiff is not entitled to call upon the valuers to disclose the grounds on which their valuation was arrived at, any more than he could call upon an arbitrator to disclose the grounds of his decision: *Pappa* v. *Rose* (1); *Tharsis Sulphur and Copper Co.* v. *Loftus.* (2)

Lumley Smith, in support of his motion. An arbitrator is not liable to an action either for negligence or for want of skill, consequently the case of an arbitrator has no application here. In *Collins* v. *Collins* (3), where, in a contract for the purchase of a brewery it was agreed that the amount of purchase-money should be determined by two arbitrators, it was held that this was not an arbitration within the meaning of s. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). That case was acted upon in *Bos* v. *Helsham* (4), where the Court of Exchequer held that a reference to ascertain the quantum of compensation only was not a reference to arbitration of an existing or future difference within the same Act. These two cases were recognised by the Court of Queen's Bench in *Re Hopper* (5), but distinguished on the ground that the agreement was not a mere valuation, but rather in the nature of an arbitrament.

COLERIDGE, C. J. I am of opinion that these interrogatories should be allowed. If the defendant was acting as an arbitrator, or as a quasi arbitrator, no action of this sort would lie against him, and consequently the plaintiff would not need interrogatories. But the ground upon which I rest my opinion is the principle which is well expressed by Cockburn, C.J., in *Re Hopper.* (6) The cases of *Collins* v. *Collins* (3) and *Bos* v. *Helsham*(4) having been there cited, his Lordship distinguished them in this way: "The authorities cited by Mr. Field no doubt establish the proposition that, where the matter to be determined by the referee is merely one of value, that is not strictly speaking an arbitration. I am not at all disposed to quarrel with the cases of *Collins* v. *Collins* (3) and *Bos* v.

5 Jur N S 80

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(1) Law Rep. 7 C. P. 32; in error, p. 525.

(2) Law Rep. 8 C. P. 1.

(3) 26 Beav. 306; 28 L. J. (Ch.) 184.

(4) Law Rep. 2 Ex. 72.

(5) Law Rep. 2 Q. B. 367.

(6) Law Rep. 2 Q. B. 372.

Helsham (1), looking at the facts upon which they were decided: but I think they must not be taken to comprehend every case of compensation or value, as, where, in ascertaining the value of the property or amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses. If it be the intention of the parties that their respective cases shall be heard and a decision arrived at upon the evidence which they have adduced before the arbitrator, it would be taking too narrow a view of the subject to say that because the object to be arrived at was the ascertaining of the value of property or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration." There is nothing of that sort here. As I gather from the declaration (which has been handed up,) the defendant and Holmes were to act as valuers, one for the purchaser, the other for the seller. If they arrived at the same figures, the money was to be paid upon the joint valuation. If not, recourse was to be had to an umpire. If that had occured, the person so appointed would have had a matter in difference before him, and he would have stood in the position of an arbitrator. Upon the authority, therefore, of the cases referred to, and upon the plain distinction between the character of a valuer and that of an arbitrator, I come to the conclusion that the interrogatories should be allowed.

KEATING, J. I have come to the same conclusion, but not, I must confess, without considerable doubt.

BRETT, J. In order to determine whether these interrogatories should be allowed or not, it is necessary to consider in what character the defendant in this case is sued. It has been held that an action will not lie against an arbitrator for want of skill. Whether an action will lie against him for negligence, I doubt very much. But, even if it would, I should have thought that a defendant standing in the position of an arbitrator could not for any purpose be interrogated as to the grounds of his decision. Where, however, a person undertakes to carry on a business for reward, he is bound to bring to the exercise of it an ordinary degree of skill, and to act with reasonable care and diligence. For a default in either respect, an action will lie against him. If, therefore, an action will lie against the defendant for want of due and reasonable skill, I see no principle of law which can absolve him from being interrogated. The question, then, is reduced to this, whether the defendant filled the character of an arbitrator or only that of a person who undertook for reward to perform the duties of a valuer. It appears that he was appointed on the part of the plaintiff to ascertain the price the plaintiff was to pay for the goodwill, stock, and fixtures of a business, another person being appointed to perform the same duty on the part of the seller. If the two agreed upon a price, there was to be an end of the matter; but, if they differed, there was to be a reference to the decision of a third person, who would then stand in the position of an arbitrator. The case of *Collins* v. *Collins* (1) seems to me to be a distinct authority to shew that the two valuers appointed in the first instance are in no sense acting as arbitrators. Looking also at the comments of Cockburn, C.J., upon that case and *Bos* v. *Helsham* (2), in *Re Hopper* (3), it seems to be clear that, where two valuers are appointed, with recourse to an umpire in the event of a difference between them, there is no arbitrament until the umpirage takes effect. The result is, that, a valuer being liable to an action for exercising his calling or profession without due skill, it follows upon principle that interrogatories may be administered to him.

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(1) Law Rep. 2 Ex. 72.

DENMAN, J. I also think these interrogatories should be allowed. I do not found my judgment upon the character of the party. If an arbitrator may be liable to an action, I incline to think he would not be privileged from disclosing upon interrogatories the grounds of his decision; but it is not necessary to decide that upon the present occasion. Assuming that the plaintiff here has a good cause of action, these interrogatories ought to be allowed.

Rule absolute.

Attorneys for plaintiff: *Sharpe, Parker, & Co.*
Attorney for defendant: *R. Sherwood.*

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

(2) Law Rep. 2 Ex. 72.

(3) Law Rep. 2 Q. B. 372.

5 Jur N.S. 30

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Negligence—Obstruction in a navigable River—Wallasey Improvement Act, 1864, 27 & 28 *Vict. c. cxvii—Notice of Action—Negligent Omission in the Performance of a public Duty—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 139.

An omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done," within the meaning of a clause requiring a notice of action.

Sect. 139 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), enacts that no writ, &c., shall be sued out against the local board, &c., "for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered," &c.

The Wallasey district was by order in council brought within the provisions of that Act, and the Wallasey local board were by various local Acts impowered to acquire and work certain ferries between Liverpool and the Cheshire side of the Mersey. By s. 2 of the Wallasey Improvement Act, 1864, it was enacted that "the Act should be executed by the local board, subject to the powers and provisions of the Public Health Act, 1848, and of the several Acts supplemental thereto, and of the Local Government Act, 1858, and of any other Act relating to the public health and from time to time in force within the district of Wallasey;" by s. 7 it was enacted that "the local board, subject to the provisions in this Act and in the Acts wholly or partially incorporated with this Act, may make and maintain, in the line or situation and according to the levels defined on the deposited plans and sections, and upon the lands delineated on the said plans and described in the books of reference thereto, the following works, that is to say," amongst others, "a pier or landing-stage at New Brighton, from a point at or near the east end of V. Road, together with all such jetties, esplanades, landing-places, toll-gates or bars, and other works and conveniences in connection therewith, as the local board shall from time to time think fit:" and s. 8 enacted that, "previously to commencing the pier or landing-stage or the works connected therewith, the local board shall deposit at the Admiralty Office plans, sections, and working drawings of the said pier or landing-stage and works connected therewith for the approval of the Lord High Admiral," or the commissioners of the Admiralty, "such approval to be signified in writing under the hand of the secretary of the Admiralty, and such pier or landing-stage and works shall be constructed only in accordance with such approval."

In supposed pursuance of the Act of 1864, the board proceeded to erect and place a pier or landing-stage at New Brighton, the pier consisting of a permanent structure built of timber and iron partly on the land and partly upon piles screwed into the foreshore down to low-water mark, and of a floating stage in the river, which rose and fell with the tide, and was connected with the pier by a bridge one end of which was attached to the floating stage and the other to the end of the pier. This was done with the consent and approval of the Admiralty and the

Mersey conservators. The whole of the permanent structure was within the lines of deviation marked on the deposited plans; but the floating landing-stage was beyond those limits.

The floating landing-stage was kept in position by means of chains stretching from either end to the shore, and by other chains attached to anchors fixed by permission in the bed of the Mersey. To mark the spot where the anchors lay, buoys composed of blocks of timber were placed; but these were at certain times of the tide drawn under the surface of the water.

A steam-tug of the plaintiffs, whilst lawfully and properly navigating the Mersey, struck upon the stock or arm of one of the anchors, and was damaged.

On a special case stated by an arbitrator for the opinion of the Court (who were to draw inferences of fact), it was found that "the defendants, in doing what they did, acted in the bonâ fide belief that they were acting under the powers given them by their Act of 1864 and the Acts incorporated therewith;" that they were not guilty of any negligence in the mode of laying down the mooring anchors; but that they "were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides, so as properly and efficiently to indicate the position of the anchor below:"—

Held, that the board were authorized by the Wallasey Act of 1864 in constructing and placing the pier, landing-stage, and anchors where they did; and that, upon the finding of the arbitrator, they had been guilty of negligence in not sufficiently buoying the anchor so as at all times of the tide to indicate to persons navigating the river the spot where it lay; but that they were entitled to a notice of action under s. 139 of the Public Health Act, 1848,—that provision being brought down and made applicable to the Wallasey Act of 1864 by s. 2 of that Act; and the omission sufficiently to buoy the anchor being "an act done" by them with a bonâ fide belief that they were exercising the powers conferred upon them by the last-mentioned Act.

THE first count of the declaration stated that the defendants had constructed, and before and until and at the time of the happening of the damage and injury thereinafter mentioned were in the possession of and had the care and management of, a certain landing-stage called the New Brighton Landing-stage, upon a public navigable tidal river; that the defendants sunk, placed, and kept, and caused to be sunk, placed, and kept in and upon the bed of the said river, at a part thereof where it was navigable, a certain anchor of the defendants attached by a cable to the landing-stage, and which anchor was covered with water and wholly concealed from view, and in such a position and at such a depth that vessels in navigating the river and passing in and along and over the place where the anchor was so sunk and placed as aforesaid, without having notice of the anchor so being sunk and being in the said place, would be and were in great danger of striking against the same and thereby of being damaged and injured; that, whilst the said anchor continued and was so sunk and placed and kept as aforesaid, no notice was given nor any proper care or precaution taken by the defendants to prevent or guard against the said danger to vessels lawfully navigating the river and passing in, along, and over the place where the anchor was so sunk, placed, and being as aforesaid; that, by means of the premises, a certain vessel or steam-tug of the plaintiffs, whilst lawfully navigating the river and passing in, along, and over the said place, struck against the anchor and thereby became and was swamped and stove in. Averment of special damage.

Second count, that, whilst the defendants were in possession of and had the care and management of the said landing-stage and of the said anchor in the said public navigable tidal river as in the first count mentioned, the said anchor became and was in such a dangerous position that vessels in navigating the said river and passing in and along and over the place where the anchor was so sunk, placed, and kept as in the first count mentioned, would be and were in great danger of striking against the same and being damaged and injured, whereof the defendants had notice; yet the defendants wrongfully and negligently allowed the said anchor to be and kept the same for a long and unreasonable time in the said position and place; and by reason of the premises in that count mentioned a certain vessel or steam-tug of the plaintiffs, whilst lawfully navigating the said river and passing in, along, and over the said place, struck against the said anchor and thereby became and was swamped and stove in, and the plaintiffs suffered such and the like injury and damage as in the first count mentioned.

Third count, that, by the Wallasey Improvement Act, 1864 (1), it was enacted that the defendants, subject to the provisions in that Act and in the Acts wholly and partially incorporated with that Act, might make and maintain in the line or situation and according to the levels defined upon the deposited plans and sections, and upon the lands delineated on the said plans and described in the books of reference thereto, certain works in that Act mentioned, that is to say (amongst others), a pier or landing-stage at New Brighton, from a point at or near the east end of

(1) 27 & 28 Vict. c. cxvii.

Victoria Road, together with all such jetties, esplanades, landing-places, toll-gates or bars, and other works and conveniences in connection therewith, as the defendants should from time to time think fit; that it was also enacted in and by that Act that, previously to commencing the said pier or landing-stage, or the works connected therewith, the defendants should deposit at the Admiralty Office plans and sections and working drawings of the said pier and landing-stage and works connected therewith, for the approval of the Lord High Admiral of the United Kingdom or the commissioners for executing the office of Lord High Admiral aforesaid, such approval to be signified in writing under the hand of the secretary of the Admiralty, and that such pier or landing-stage and works should be constructed only in accordance with such approval; and that, when any such pier or landing-stage or works should have been commenced or constructed, it should not be lawful for the defendants to alter or extend the same without obtaining previously to making any such alteration and extension the like consent or approval; that it was further enacted in and by that Act that the defendants, in the construction of the pier or landing-stage, might deviate laterally from the line or situation thereof shewn on the deposited plans to the extent of the limits of deviation shewn on those plans (1): Averment, that, previously to commencing the said pier or landing-stage or the works connected therewith, the defendants did deposit at the Admiralty Office plans, sections, and working drawings of the said pier or landing-stage and works connected therewith, for the approval of the then commissioners for executing the office of Lord High Admiral aforesaid, and such approval was signified in writing under the hand of the secretary of the Admiralty, and the defendants did commence and construct a pier or landing-stage and works connected therewith as and for such pier or landing-place as in the Act mentioned: Breach, that the defendants did not construct the said pier or landing-stage and the said works in connection therewith in accordance with the said approval and the said Act of Parliament, but constructed and extended the said pier or landing-stage and the works connected

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(1) "As regards the pier or landing-stage, not exceeding five feet." 27 & 28 Vict. c. cxvii, s. 15.

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therewith otherwise than in accordance with such approval, and so as that the same deviated laterally from the line or situation thereof shewn on the deposited plans beyond the limits of deviation shewn on the said plans, without the defendants having obtained previously to making such extension and deviation such like consent or approval thereto, and in and by reason of so doing the defendants put and placed and kept in and upon the bed of the river, at a part thereof where it was navigable, a certain anchor, &c., as in the first count.

Fourth count, that, by the said Wallasey Improvement Act, 1864, it was enacted as in the last preceding count mentioned and set forth, and that the defendants did commence and construct a certain pier or landing-place as and for such pier and landing-place as in the Act mentioned; yet that the defendants did so construct the said pier and landing-stage that the same deviated laterally from the line or situation thereof shewn on the said deposited plans beyond the limits of deviation shewn on the said plans, and in and by reason of so doing the defendants put, placed, and kept in and upon the bed of the river, at a part thereof where it was navigable, a certain anchor of the defendants, &c., as in the third count. Claim, 1000*l.*

Pleas, 1. Not guilty, the statutes referred to in the margin being 11 & 12 Vict. c. 63 (a public Act), 21 & 22 Vict. c. lxiii, s. 4, 27 & 28 Vict. c. cxvii, s. 2, and 30 & 31 Vict. cxxxii, s. 5; 2. Not possessed; 3. To the first count, that the defendants did not sink, place, or keep, or cause to be sunk, placed, or kept, such anchor, as alleged; 4. To the first count, that the defendants did what is complained of in that count under and by virtue and in exercise of the powers given to them and contained in the Wallasey Improvement Act, 1864, and the Acts incorporated therewith; 5. To the second count, that the defendants were not in possession of nor had they the care or management of the said anchor, as alleged. Issue thereon.

The cause came on for trial before Kelly, C.B., at the Summer Assizes at Liverpool, 1871, when a verdict was entered for the plaintiffs, by consent, damages 1000*l.*, subject to be reduced or vacated, and instead thereof a verdict entered for the defendants or a nonsuit, according to the decision of the Court upon the

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following case, which was stated by an arbitrator,—the Court to be at liberty to draw any inferences or find any facts which in the opinion of the Court a jury ought to have drawn or found:—

1. The plaintiffs are the owners of steam tug-boats plying for hire within the port of Liverpool, and were on the 15th of June, 1870, and still are, the owners of a steam tug-boat called *The Lioness.*

2. The defendants at the time last aforesaid were and still are the Wallasey Local Board, and were at the time aforesaid and still are possessed of a pier, bridge, and landing-stage situate at New Brighton, in the county of Chester, which bridge at one end thereof was and is attached to the pier, and at the other end thereof was and is attached to the landing-stage, which landing-stage and bridge rose and fell and still rise and fall with the tide. The pier was and is constructed of piles screwed down into the soil of the river Mersey between high and low-water mark; and the whole of the pier was and is above low-water mark of ordinary spring-tides. The bridge attached to the pier and landing-stage as aforesaid did not and does not rest upon or touch the soil or waters of the Mersey, and the greater part thereof in length was and is above low-water mark of ordinary spring-tides. The remainder thereof was and still is suspended to the landing-stage below low water-mark of ordinary spring-tides; and the whole of the landing-stage, which was and still is moored by anchors fixed into the bed of the river, floated and still floats upon the waters of the river below low-water mark of ordinary spring-tides; and certain anchors which moored the landing-stage were and still are fixed into the bed of the river outside the line of the landing-stage and below low-water mark of ordinary spring-tides. The river Mersey at the locus in quo runs north and south; and the landing-stage, which is 204 feet long and 30 feet 6 inches wide, was and still is moored in the river, lying north and south.

3. The Acts of Parliament of 5 & 6 Vict. c. 110, 21 & 22 Vict. c. lxiii, 27 & 28 Vict. c. cxvii, 30 & 31 Vict. c. cxxxii, and all other Acts of Parliament relating to the port of Liverpool and to the Mersey Docks and Harbour Board, a copy of the parliamentary plans deposited under 27 & 28 Vict. c. cxvii., marked C., a plan

marked A. of the said pier, bridge, and landing-stage, shewing the low-water mark of the Mersey at ordinary spring-tides, and also shewing the true position of the old and now disused slip as distinguished from its false position as shewn on the parliamentary plan, a general plan shewing the whole of the bridge, landing-stage, and approaches, marked D., and a plan of the moorings of the landing-stage, signed by Vice-Admiral George Evans, acting conservator, and dated Nov. 1, 1865, marked B., were to be taken as forming part of the case.

4. The fourth paragraph set out the appointment by the conservators of the river Mersey, viz. the first commissioner of the Admiralty, the Chancellor of the Duchy of Lancaster, and the commissioners of woods and forests, and of Admiral Evans as acting conservator for the purposes of 5 & 6 Vict. c. 110.

The plans for the construction of the pier, bridge, and landing-stage, as also the plan shewing the mode in which the landing-stage was to be moored, were all of them duly approved by the commissioners for the conservancy of the river Mersey, and by the Lord High Admiral or the commissioners of the Admiralty, on the 1*st of November*, 1865. (1)

5. No such notice as mentioned in 5 & 6 Vict. c. 110, s. 6, was sent or delivered to the clerk of the peace for the county of Chester and borough of Liverpool; and no parliamentary plans were deposited with the clerk of the peace for the borough of Liverpool; nor was any notice given to him. Though parliamentary plans were deposited with the clerk of the peace for the county of Chester, no notice was deposited therewith.

6. The only mooring-anchor which was important in this case was indicated on the plan B. by the anchor marked F., and was laid out with an iron chain from the south end of the landing-stage in a south easterly direction in a part of the bed of the river Mersey below low water-mark of ordinary spring-tides, and over which vessels navigating the river used and had a right to sail, and where vessels navigating the river used and had a right to bring up and anchor.

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(1) The portions of the case printed in italics were added by way of amendment, at the suggestion of the Court when the case came on for argument.

7. The said anchor was a mooring-anchor with one fluke, and an arm at the end of the anchor shank running at right angles to the fluke, and which when the fluke was properly imbedded in the bed of the river rested upon the bed of the river; and to the ring at the end of the shank was attached a long piece of light iron chain having at the end of it a piece of timber intended to act as a buoy, but which piece of timber was, by reason of the strength of the current of the river, carried below the surface of the water, and in no respect indicated the position of the mooring-anchor below, except at and about dead high and low water of the tides. *The said piece of timber was wholly insufficient to indicate the position of the anchor; and the defendants were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides, so as properly and efficiently to indicate the position of the anchor below.*

8. The defendants frequently, and as often as they deemed necessary, with a long rope each end of which was attached to a boat, swept over the whole of their mooring-anchors, including the mooring-anchor in question, in order to ascertain whether the anchors were in their proper places and undisturbed; and this they had done two or three days before the occurrences hereinafter mentioned.

9. The defendants were not guilty of any negligence in the mooring-anchors they used, in the mode of laying them down, or in the means adopted to ascertain from time to time whether they were undisturbed; *and the defendants, in doing what was complained of, acted in the bonâ fide belief that they were acting under the powers given them by their Act of* 1864, *and the Acts incorporated therewith.*

10. The plaintiffs did not give the defendants any notice of action.

11. Early in the morning of the 15th of June, 1870, the plaintiffs' steam tug-boat *Lioness* anchored 400 or 500 yards to the south and east of the landing-stage; and in about four hours afterwards, having lifted her anchor, the tide being an ebb tide, and near low-water, she struck against the arm of the mooring-anchor, which went through the bottom of the steam tug-boat

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Lioness, and there and then sunk her and caused her considerable damage. She was afterwards raised, taken into dock, and repaired.

12. The mooring-anchor by some means unaccountable for and unknown to the defendants had been lifted from the bed of the river, and the arm of the anchor, instead of resting in a horizontal position upon the bed of the river, had assumed an upright position, and thus had penetrated the bottom of the steam tug-boat.

13. The plaintiffs were guilty of no negligence whatsoever in navigating their steam tug-boat, in anchoring, or in raising their anchor, but in all respects navigated and managed the steam tug-boat in a lawful, careful, seamanlike, and proper manner.

14. There was no floating landing-stage at the locus in quo, or at or in connection with the old slip: but the present landing-stage is the only one which has ever been placed in that part of the river Mersey.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover from the defendants, upon the facts as above stated. If the Court should be of opinion in the affirmative, the verdict was to stand; but the damages were to be reduced to 550*l.* If the Court should be of the contrary opinion, the verdict entered for the plaintiffs was to be vacated, and instead thereof a verdict was to be entered for the defendants, or a nonsuit.

Aspinall, Q.C. (*L. Temple, Q.C.*, with him), for the plaintiffs. The landing-stage as constructed is not constructed or placed in accordance with the provisions of the several Acts or with the parliamentary plans. At all events, upon the finding of the arbitrator in this case, the defendants are liable for having neglected to use sufficient means to indicate at all times of the tide the place where the anchor was, so as to prevent its being a nuisance to the navigation. Further, the provisions of the Public Health Act, 1848 (11 & 12 Vict. c. 63), as to giving notice of action, are not applicable to such a case as this.

The 27 & 28 Vict. c. cxvii, s. 7, gives the local board power (with the consent and approval, and according to the plans mentioned in s. 8) to erect "a pier or landing-stage" at New Brighton.

[DENMAN, J. "And other works and conveniences in connection therewith."]

Those general words do not authorize the placing in the navigable part of the river, and beyond the line of deviation marked in the parliamentary plans, a structure as large as the permanent pier itself. The putting it there without the authority of an Act of Parliament constitutes it a public nuisance: Hale de Portibus Maris, 85. In *Hart* v. *Mayor, &c., of Albany* (1), where this subject was fully discussed, Sutherland, J., says: "The appellants, like all other citizens, can only use the Hudson river as a highway for the purposes of navigation: they have no right exclusively to occupy any part of it by either floating or permanent buildings or obstructions. This float, if permanently moored and continued in the open part of the river, thereby rendering the navigation less safe and convenient, would, I apprehend, most clearly be a public nuisance, liable to be indicted as such, or to be abated without indictment by any individual who might be injured or aggrieved by it. The cases of *Rex* v. *Russell* (2), *Rex* v. *Cross* (3), and *Rex* v. *Jones* (4), all shew that any obstruction of a public street or highway for an unreasonable length of time, although in the prosecution of a lawful business, as in the loading or unloading of waggons or drays, or by stages waiting and soliciting for passengers, is indictable as a public nuisance, although room enough might still be left for the accommodation of the public on the opposite side of the street. The public are entitled to the use and enjoyment of the whole of the highway, and no individual can appropriate a portion of it to his own exclusive use, and shield himself from responsibility to the public by saying that enough is still left for the accommodation of others."

[DENMAN, J., referred to *Mayor of Colchester* v. *Brooke* (5) and *Gann* v. *Free Fishers of Whitstable.* (6)]

Assuming this obstruction to have been lawfully placed in the

(1) 9 Wendell, 571, at p. 584.
(2) 6 East, 427.
(3) 3 Camp. 224.
(4) 3 Camp. 229.
(5) 7 Q. B. 339, 373; 15 L. J. (Q.B.) 59.
(6) 11 H. L. C. 192; 20 C. B. (N.S.) 1.

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river, it was clearly the duty of the defendants to give notice by a proper buoy of the spot where the concealed danger lay; and for a neglect of this duty they are liable to an action: *Brown* v. *Mallett* (1); *White* v. *Crisp* (2); *White* v. *Phillips.* (3) A passage in Liber Niger Admiralitatis, p. 111 (4), shews that this duty was rigidly enforced from the very earliest time: "Two shippes or more lyeing in a haven at scant of water, and one of the ankers lye to nere another shyp, the mayster of the sayd shyppe ought to say, Mayster take up your anker, it is to nere us and may do us harme. And, yf they wyll not remove it, the mayster and his maryners that myght have the domage may take it up and set it ferther frome them, but yf the other wyll not suffre them, and it do them domage, the other must restore it, and yf so be that they had fastened to it no buy, and yf it do hurt they be holden to yelde the hurte all alonge, and yf they lye drye in a haven, they ought to set markes at theyr ankers that may playnely be sene above the water. The jugement is suche."

Then, as to notice of action. The 139th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), provides that no action shall be brought against the local board of health or against any of its officers for anything done under the provisions of that Act, until after the expiration of one month after notice, nor after six months after the cause of action shall have arisen. The defendants are a local board of health; no notice was given, and the action was brought after the expiration of six months. The question is whether they can plead this section in answer to an action for a thing done or intended to be done under any of the local Acts referred to. By s. 4 of 21 & 22 Vict. c. lxiii it is provided that "this Act shall be executed by the local board according to the powers and provisions of the Public Health Act, 1848, and of the several Acts supplemental thereto or otherwise relating to the public health and from time to time in force within the limits of this Act:" and s. 5 incorporates 8 & 9 Vict. c. 18, the Lands Clauses Consolidation Act, and parts of the Waterworks Clauses

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(1) 5 C. B. 599; 17 L. J. (C.P.) 227.

(2) 10 Ex. 312; 23 L. J. (Ex.) 317.

(3) 15 C. B. (N.S.) 245; 33 L. J. (C. P.) 33. 10 Jur N.S. 425

(4) 1871 edit. by Twiss. Also found in The Laws of the Sea, art. xv. p. 142; Laws of Oleron.

Act, 1847, and Gasworks Clauses Act, 1847, 10 & 11 Vict. cc. 15 and 17. The 27 & 28 Vict. c. cxvii (the Act under which the defendants acquired the powers now in question), s. 2, provides that "this Act shall be executed by the local board subject to the powers and provisions of the Public Health Act, 1848, and of the several Acts supplemental thereto, and of the Local Government Act, 1858, and of any other Acts relating to the public health and from time to time in force within the district of Wallasey:" and s. 3 provides that "the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), shall, so far as the same respectively are applicable to the purposes of this Act, and are not expressly altered or varied by this Act, be incorporated with this Act." Neither of these provisions makes things done under 27 & 28 Vict. c. cxvii things done under the Public Health Act, 1848. Then comes 30 & 31 Vict. c. cxxxii, s. 5, which provides that "this Act shall be executed by the local board with the powers and indemnities and according to the provisions of the Public Health Acts, and those Acts shall, in relation to the local board and the several objects and purposes of this Act, be read and construed as if the purposes and provisions of this Act were purposes and provisions of the Public Health Acts, so far as the same shall be applicable thereto, and except so far as any of the provisions of the Public Health Acts are expressly varied, altered, or otherwise provided for by this Act." That carries the matter no further. Besides, the Public Health Act itself is by the Provisional Order in force only as regards Wallasey within particular limits; and the greater part of the pier and the whole of the floating stage are outside those limits.

[KEATING, J. Would not the words "subject to the powers and provisions of the Public Health Act, 1848," extend to acts done under the local Acts the protection afforded by s. 139?]

Only in respect of things done under the Public Health Act. These local Acts are to be construed most strongly against depriving the subject of a remedy for a wrong. That which is complained of here is a nonfeasance,—not as "an act done," but an

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omission to do something,—for which it may be doubted whether the defendants would under any circumstances be entitled to a notice of action: *Newton* v. *Ellis* (1); *Mason* v. *Birkenhead Improvement Commissioners.* (2)

Sir John Karslake, Q.C. (*Butt, Q.C.*, and *R. G. Williams*, with him), for the defendants. The local board were impowered under 21 & 22 Vict. c. lxiii and a prior Act to acquire certain ferries. Further powers were given to them by 27 & 28 Vict. c. cxvii, s. 7, for the erection, amongst other things, of the pier and landing-stage in question, "together with all such jetties, esplanades, landing-places, toll-gates or bars, and other works and conveniences in connection therewith,"—such works to be, by s. 8, subject to the approval of the Admiralty. One of the essentials to a pier or landing-place is a floating landing-stage below low-water mark. The permanent erection above low-water mark was all within the line of deviation indicated in s. 15 and marked on the deposited plan; there could be no line of deviation below low-water mark. It is not suggested that the anchor was in itself a nuisance; the only complaint is that there was not a buoy over it of such a description as to resist the force of the tide and so as at all times to indicate the exact position of the anchor.

It is said that this was an act of omission for which the local board were not entitled to a notice of action under the 139th section of the Public Health Act, 1848. All that is done by the local board under the provisions of the local Acts, is done by them under the powers and authorities of the original Act, and with the immunities and privileges conferred on them by s. 139 of that Act. In *Wilson* v. *Mayor, &c., of Halifax* (3), the defendants, a local board, left unfenced a goit adjoining a public footpath within their district, by reason of which the plaintiff's husband, while using the footpath, fell into the goit and was drowned. It was held that, assuming an action would lie for this nonfeasance, the defendants were entitled to notice of action under s. 139 of the Public Health Act, 1848, the alleged cause of action being a thing "done or intended to be done" under the provisions of the Act,

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(1) 5 E. & B. 115; 24 L. J. (Q.B.) 337.

(2) 6 H. & N. 72; 29 L. J. (Ex.) 406.

(3) Law Rep. 3 Ex. 114.

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within the meaning of that section. The Lord Chief Baron in his judgment (1) refers to *Davis* v. *Curling* (2) and *Poulsum* v. *Thirst* (3), both of which were cases of acts of omission. In *Newton* v. *Ellis* (4) the action was brought against a contractor under the local board for leaving an excavation unfenced and unlighted. It was argued that "the complaint is, not that the contractor did something under the provisions of the Act, but that, when he did so, he neglected to take proper precautions for preventing injury. That is a nonfeasance of his own." But Lord Campbell said (5): "The action is brought for an improper mode of performing the work. How can that be called a nonfeasance? It is doing unlawfully what might be done lawfully; digging improperly without taking steps for protecting from injury. That is a case expressly under the Act. It would be very inconvenient if a different rule were to prevail; for, then, even if the defendant had done all he did lawfully, he would not be entitled to notice of action; he would not have protection in the exact case where it was required that he should be protected." So, here, the action is brought for improperly doing something which might have been done lawfully, viz. the not sufficiently protecting an anchor lawfully laid down. In *Selmes* v. *Judge* (6), where the question arose under a similar provision in the Highway Act, Blackburn, J., said: "The defendants were entitled to notice of action. It has long been decided that such a provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts, which are intended to be done under the authority of an Act of Parliament, but which, by some mistake, are not justified by its terms, and cannot be defended by its provisions." And further on he says: "I agree that, if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute." The arbitrator does not find that the defendants were guilty of negligence in laying the anchor originally. That being so, according to the principles laid down in

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(1) Law Rep. 3 Ex. at p. 120.

(2) 8 Q. B. 286.

(3) Law Rep. 2 C. P. 449.

(4) 5 E. & B. 115; 24 L. J. (Q.B.) 337.

(5) 5 E. & B. at p. 123.

(6) Law Rep. 6 Q. B. 724.

Rex v. *Russell* (1), *Hancock* v. *York, Newcastle, and Berwick Ry. Co.* (2), and *White* v. *Phillips* (3), the defendants cannot be held responsible for the damage here complained of. As to the Blacke Booke of the Admiralty, the passage which follows that referred to shews how little reliance is to be placed upon that work as an authority. (4)

Aspinall, Q.C., in reply. The acts complained of in *Newton* v. *Ellis* (5) and *Poulsum* v. *Thirst* (6) were the improperly doing something which might lawfully be done: and in *Davis* v. *Curling* (7), *Wilson* v. *Mayor, &c. of Halifax* (8), and *Selmes* v. *Judge* (9), the defendants were charged with negligence in the performance of a duty imposed upon them by the Act of Parliament itself.

KEATING, J. This is a case of very considerable importance. The complaint of the plaintiffs is that they, being the owners of a steam-tug navigating the river Mersey in a place where she had a right to navigate, the stock or arm of an anchor placed there by the defendants and concealed from view pierced the bottom of their vessel and caused it considerable damage. It appears from the statement of the case by an arbitrator that the defendants are the Wallasey Local Board, and as such were by virtue of several Acts of Parliament which are referred to in the case impowered to engage in the transport of passengers by means of certain ferry-boats from Liverpool to New Brighton and other places on the Cheshire side of the Mersey, and to provide and maintain such steam and other boats, materials, and things, and employ such persons as should be necessary for the proper and efficient working of such ferries. (10) This being the state of things, and it being found that the landing-place at New Brighton was insufficient for the traffic, the board sought for powers for the erection and maintenance of a new pier and landing-stage at that place; and accordingly in 1864 an Act of 27 & 28 Vict. c. cxvii was passed, under the powers of which a pier and landing-stage were constructed; the pier being a solid structure resting on piles screwed down into the soil of the river between high and low-water mark, the whole of it being above low-water mark of ordinary spring tides; and the landing-stage consisting of a large covered barge or dummy which floated in the stream of the river below low-water mark, being retained in its position by means of anchors and chains in the bed of the river; the landing-stage being connected with the pier by a bridge, one end of which rested on the landing-stage and the other on the pier. The case has been argued very ably and at considerable length.

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(1) 6 B. & C. 566.

(2) 10 C. B. 348.

(3) 15 C. B. (N.S.) 245; 33 L. J. (C.P.) 33. 10 Jur N.S. 425.

(4) "The maryneres of Brytayne ought to have but one meale on the day, by reason of that they have drynkes goynge and comynge, and they of Normandy ought to have two meales of the kitchen on the day because they have but water goynge at the shyp costes. And whan she is at the shore, the maryners to have wyne to drynke and other at the fynding of the mayster. This is the jugement."

(5) 5 E. & B. 115; 24 L. J. (Q.B.) 337. 1 Jur N.S. 850

(6) Law Rep. 2 C. P. 449.

(7) 8 Q. B. 286.

(8) Law Rep. 3 Ex. 114.

(9) Law Rep. 6 Q. B. 724.

(10) See 8 & 9 Vict. c. vi, and 21 & 22 Vict. c. lxiii.

The first contention on the part of the plaintiffs was, that, in the construction of this pier and landing-stage, the defendants exceeded the powers conferred upon them by the Act,—that they constructed them in a manner and upon a spot in and upon which they were not authorized to construct and to place them; and further, that for the purpose of securing the landing-stage they cast an anchor on a place where they were not authorized to place it, and where it was a public nuisance. And there is no doubt that the complaint of the plaintiffs in this respect is found by the arbitrator to be to a certain extent well founded. This Act of Parliament is somewhat obscure, but, in my opinion,—which I think it right to declare, although it is not the point upon which our decision turns,—the structure was authorized by the terms of the Act. There is no dispute as to the mode in which the landing-stage itself was constructed. Mr. Aspinall pointed our attention to the plan marked A. on which the limits of deviation are defined; and I think he is right in saying that parliament did not expressly authorize any permanent structure beyond those limits. The northern part of the landing-stage is within those limits, but the southern portion was beyond them; and it is as to this latter portion that the difficulty arises. Sect. 7 of the Act of 1864 enacts that the local board, subject to the provisions in that Act and in the Acts wholly or partially incorporated therewith, "may make and maintain in the line or situation and according to the levels defined on the deposited plans and sections, and upon the lands delineated on the said plans and described in the books of reference thereto, the following *works*, that is to say, *a pier or landing-stage* at New Brighton, from a point at or near the end of Victoria Road, together with all such jetties, esplanades, *landing-places*, toll-gates or bars, *and other works and conveniences in connection therewith*, as the local board shall from time to time think fit." Under that section, in my opinion, the board would be strictly confined to the lands delineated in the plan, as to any permanent structure they might erect. But then comes s. 8, which enacts that, "previously to commencing the pier or landing-stage, or the works connected therewith, the local board shall deposit at the Admiralty Office plans, sections, and working drawings of the said pier or landing-stage and works connected therewith, for the approval of the Lord High Admiral or the commissioners for executing the office of Lord High Admiral, such approval to be signified in writing under the hand of the secretary of the Admiralty, and such pier or landing-stage and works shall be constructed only in accordance with such approval."

It is to be observed that the care and management of the navigation of the Mersey are confided to certain persons, consisting of the first Commissioner of the Admiralty, the Chancellor of the Duchy of Lancaster, the commissioners of woods and forests (1) and of Admiral Evans as public conservator; and that the plans for the construction of the pier, bridge, and landing-stage, as also the plan shewing the mode in which the landing-stage was to be moored, were duly approved of by the conservators and by the Commissioners of the Admiralty. The plan marked B. represents the state of things now existing, and the anchor as afterwards laid down, and in every respect represents the works as erected.

The intention of the legislature, to be gathered from ss. 7 and 8, seems to me to be this,—We will deal with the taking by the local board of any lands necessary for carrying out the works, and will confine the local board to those lands; but, in the construction of the landing-stage, there may be something to interfere with the navigation, and therefore we will require the board to obtain the sanction of the conservators. That sanction having been given, the landing-stage with its moorings as laid are in my opinion legalised by ss. 7 and 8 of the Act; though I must repeat that the language of the Act is not so clear as to enable me to give a very satisfactory opinion.

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(1) Now, of Public Works.

But Mr. Aspinall has further contended, and as it seems to me, properly contended, that, even if this be so, the local board were bound to exercise their powers with due and reasonable care and diligence; and that, as the arbitrator has found that the laying down of the anchor marked F. on the plan B. with a buoy which was insufficient to indicate the position of the anchor below was an act of negligence on the part of the defendants, they are responsible for the consequences: and, upon this finding, it appears to me that the defendants would clearly be liable to an action, even assuming the anchor to have been legally placed there. As a matter of fact, therefore, I come to the conclusion that the defendants were guilty of the negligence complained of, and that that negligence was the cause of the accident; and, as matter of law, I hold that negligence to give the plaintiffs a cause of action against the local board.

But, assuming that to be so, then comes the further question, whether the defendants are not absolved from liability in this action, by reason of the absence of a notice of action. For myself, I must express my regret that this case should be decided upon such a point; but my opinion is that the defendants were entitled to notice. This question depends upon the construction of the several Acts of Parliament which have been placed before us.

Now, the local board was originally constituted under the Public Health Act, 1848; and it is not denied that, for anything done or intended to be done under that Act, they would be entitled to a notice of action under s. 139. But the difficulty arises upon the subsequent Acts; and the first question is whether the provisions of that section are extended to the Act of 1864, under which this pier and landing-stage were erected. The solution of that question depends mainly on the words of s. 2 of the last-mentioned Act. But, in construing that section, it is most material to see what was the object of that Act. The preamble, after reciting that "under the provisions of the Wallasey Improvement Act, 1858 (21 & 22 Vict. c. lxiii), and of the Wallasey Improvement Act, 1861 (24 & 25 Vict. c. iv), certain ferries called respectively New Brighton Ferry, Egremont Ferry, and Seacombe Ferry, with the landing-stages, piers, jetties, slips, and accommodations connected therewith, are vested in and worked and managed by the Wallasey local board," goes on to recite that it was "expedient that the local board be impowered to construct a pier or landing-stage at New Brighton, in connection with their existing ferry at New Brighton, and that further powers should be conferred upon them in relation to their ferries, landing-stages, and steam-boats, and with respect to the tolls and rates leviable in respect thereof." That, however, was not the only object. The board sought powers to construct an additional reservoir, and to raise a further sum in connection with and for the purposes of their ferries, landing-stages, and piers, and also further powers in relation to the good government and sanitary condition of the district. All these objects being in view, s. 2 provides that "this Act shall be executed by the local board subject to the powers and provisions of the Public Health Act, 1848, and of the several Acts supplemental thereto, and of the Local Government Act, 1858, and of any other Act relating to the public health and from time to time in force within the district of Wallasey." The question is whether that section carries on the provisions in s. 139 of the Local Government Act, 1848, to those of the Act of 1864. It appears to me that it does. The words are large enough, and s. 139 is a provision, and an important provision, of the Act of 1848; and all the reasons equally exist to extend it to the subsequent Act, as any of the other provisions, and its protection clearly would be as requisite in working out the new Act as the old one. Mr. Aspinall contended that s. 139 does not extend to works done under the Act of 1864, because the powers to be exercised by the board under it are limited to the Wallasey district, and a large portion of the erections in question is situate without that district. That argument was not very strongly relied on, and cannot, I think, prevail; because, if the legislature intended to extend the powers and provisions of the former Act, they must have intended to extend it in all its parts, and could not have contemplated a view so limited as Mr. Aspinall contends for. It seems to me that the notice clause is brought down to the Act of 1864.

That, however, does not dispose of the matter; a further question arises, viz. whether the acts complained of here are acts which could be done by the local board under the provisions of the Act of Parliament, so as to entitle them to a notice of action. The arbitrator finds, in par. 9 of the case, that "the defendants, in doing what was complained of, acted in the bonâ fide belief that they were acting under the powers given them by their Act of 1864 and the Acts incorporated therewith." That finding is as express as could be; and, if it were necessary so to do, I should feel inclined to hold that we are bound by it. I do not, however, feel it at all necessary to say so, because I entirely agree with that finding.

It has been suggested that protection is not intended to be given by clauses of this description in cases of nonfeasance. But that that is not so, is clear, from the cases of *Davis* v. *Curling* (1), *Newton* v. *Ellis* (2), *Wilson* v. *Mayor, &c., of Halifax* (3), and *Selmes* v. *Judge* (4), all of which seem to me to establish that a case of what appears to be nonfeasance may be within the protection of the Act. But I think we are not driven to consider that question. What is it that is complained of here? It is this. It being the duty of the defendants to buoy an anchor which they had sunk in a navigable river, they have omitted to buoy it in a sufficient manner. What they did was, to attach by a light chain fixed to the ring of the anchor stock a piece of floating timber: and the finding as to this is as follows:—"The said piece of timber was wholly insufficient to indicate the position of the anchor; and the defendants were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the currents of the ebb and flow of the tides, so as properly and sufficiently to indicate the position of the anchor below." It seems to me that that clearly was an act which, if done and intended to be done (as the arbitrator has found) in pursuance of the Act, brings the case within the protection of the clause requiring a notice of action.

The protection of a clause entitling a defendant to notice of action is only required where something has been done which ought

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(1) 8 Q. B. 286.

(2) 5 E. & B 115; 24 L. J. (Q.B.) 337. 1 Jur. N.S. 850

(3) Law Rep. 3 Ex. 114.

(4) Law Rep. 6 Q. B. 724.

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not to have been done, or something omitted which ought to have been done. It seems to me that the defendants in this case were clearly entitled to notice, and, none having been given, they are entitled to judgment. I repeat that I regret extremely that a case of this importance should be disposed of on what some may think a merely technical objection.

BRETT, J. The plaintiffs sue the defendants for an injury done to their steam-boat; and they shape their cause of action in one of two ways. In the first place, they say that the defendants placed in a navigable river, a public highway, a structure which was unauthorized and therefore a public nuisance, and that, without any negligence on the part of the plaintiffs or their servants, that obstruction caused damage to their steam-boat. I apprehend that, if the plaintiffs could maintain those propositions, they would establish a good cause of action. But the plaintiffs go further and say that, although the structure might have been authorized, the defendants have negligently omitted to do something which they were bound to do, or have done in a negligent manner what they were bound to do, and have thereby occasioned injury to them, the plaintiffs; and, if that be made out, I apprehend that the plaintiffs are equally entitled to recover. The defendants in answer contend that what they have done was not an unlawful obstruction to the navigation, but was authorized by an Act of Parliament; and further they say that the findings in this special case do not establish such negligence as will render them liable to an action; and that there is no finding that their negligence, if any, contributed to the accident; and further they say that, if they could be liable on either the first or the second ground, still the plaintiffs cannot maintain this action, inasmuch as they (the defendants) were entitled to a notice of action under s. 139 of the Public Health Act, 1848, and none was given. If, therefore, the Court should be of opinion that notice of action was required, and that the second alleged negligence is made out, it will be unnecessary to decide the first question at all. But, inasmuch as the first question is of the greatest importance, and considering the way in which the case was first stated (there being no finding of negligence), and considering that that question has been very fully argued, I think the Court is bound to express its opinion upon it, whether that opinion be a clear or a doubtful one; because it cannot be denied that it is of the utmost importance that the board should know whether or not they are conducting these ferries in a manner which is within the powers conferred upon them by their Acts of Parliament, so as to enable them, if they are not, to apply a remedy. For that reason I proceed to give my opinion upon the first point.

Now, that first point depends upon the construction of two sections of the Act of 1864; for, unless that statute gave the board authority to do so, they could not have placed the floating pier and landing-stage where they did, inasmuch as it would obstruct the navigation of a public highway, and be a public nuisance. The question, therefore, is, whether that which they did was authorized or not. The wording of the Act is by no means clear. In order to arrive at a correct construction of it, it is necessary to consider what was the state of things before the passing of the Act, and what it was that was required. It appears that the board had, for the convenience of the public, become the proprietors of the ferry between Liverpool and New Brighton. It further appears that the landing-place at New Brighton did not afford sufficient accommodation for the large number of persons using the ferry, and that a new one was required. Now, it is obvious that, in order to erect a permanent pier, parliamentary powers would be required if it was to be constructed upon the land of private owners or upon part of the fore-shore which would be the property either of the Crown or of the lord of the manor. But to carry such a structure merely to the edge of low-water mark would fail to make a convenient landing-stage; and, if any part of it were taken below low-water mark, no question of private ownership could arise as to that. The only question in that case would be whether the rights of the public were to be obstructed. The Act contains enactments with respect to plans. These would necessarily shew the nature of the intended structure, but they would only necessarily deal with the permanent structure to be placed on the land, and not necessarily with the floating landing-stage, which would be below low-water mark.

The powers given to the board are contained in ss. 7 and 8.

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The former enacts that the board may "make and maintain in the line or situation and according to the levels defined on the deposited plans and sections, and upon the lands delineated on the said plans and described in the books of reference thereto, the following *works.*" If all that followed had been permanent structures constituting a pier, I should have felt some doubt whether a "floating-stage" would be a thing authorized by that section. But there is something more than a pier to be constructed. There is to be a "pier or landing-stage," and there was, it may be observed, to be also a "reservoir." The word "works" might apply to all those. But, together with the pier or landing-stage, there were to be "such jetties, esplanades, landing-places, toll-gates or bars, *and other works and conveniences in connection therewith, as the board shall from time to time think fit.*" It seems to me that that contemplates not merely works then in the minds of the promoters, but also works which were not then in their minds, works which might from time to time be considered as "conveniences in connection therewith." There was a jetty which was to be supported upon piles down to low-water mark. I am inclined to think the defendants did not at the time contemplate the making of the precise adjuncts which they afterwards did make. The bed of the Mersey, like that of most other tidal rivers, alters from time to time. If the whole landing apparatus had stopped permanently at low-water mark, there was a possibility or a probability that the sand or shingle would become silted up so as to prevent the ferry-boats coming up to the pier. The inconvenience resulting from that state of things would have been monstrous. Passengers would have been obliged, as in olden times, to land by means of flat-bottomed boats. It sems to me, therefore, that the Act contemplated further conveniences to be added from time to time. Still, however, the defendants were not to have power absolutely to deal with the navigation of the Mersey; therefore the powers conferred upon them by s. 7 were to be exercised subject to the control mentioned in s. 8. Previously to commencing the pier or landing-stage, "or the works connected therewith," the local board are to deposit at the Admiralty Office plans, sections, and working drawings of "the said pier or landing-stage, and works connected therewith," for the approval of the Lord High Admiral, &c., and "such pier or landing-stage and works shall be constructed only in accordance with such approval." That provision affords ample protection to all the public. It is obvious that the pier as originally intended was found to be not the most convenient for the purpose, and therefore it was shortened to its present dimensions, and the floating landing-stage below low-water mark, with the connecting bridge, were substituted. In my opinion, inasmuch as the approval and consent of the Admiral and of the conservators of the river Mersey were obtained (as it is found they were), the floating landing-stage and its moorings, being "conveniences connected therewith," though they may to some extent obstruct the navigation, were authorized by the terms of the Act of Parliament. It seems to me, therefore, that the plaintiffs cannot succeed upon the first cause of action which they went down to try.

But I think there is a cause of action which the plaintiffs may sustain. The board were bound to exercise due care in doing that which the Act authorized them to do. The arbitrator has found that the defendants were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides, so as properly and efficiently to indicate the position of the anchor below: and I am not disposed to act on my own private view against the spirit of his finding. I take the real meaning of that finding to be that the absence of a sufficient buoy was the cause of the accident. The arbitrator has found also that the plaintiffs were guilty of no negligence whatsoever in navigating their steam-tug. He has therefore found that the defendants had either done something negligently which they were bound to do with reasonable care, or that they have negligently omitted to do something which they ought to have done with reasonable care, and that that negligence was a cause of injury to the plaintiffs, without any default on their part. That constitutes a cause of action in respect of which the plaintiffs would be entitled to recover damages.

Then arises the question whether the plaintiffs are disentitled to recover by reason of their having omitted to give a notice of action. That again depends upon the construction of the Acts of Parliament. The pier and landing-stage were erected and placed under the authority of the Wallasey Act of 1864, 27 & 28 Vict.

c. cxvii. The case finds that what was done by the board was done by them in the bonâ fide belief that they were acting under the powers given them by that Act. The first question therefore is, whether, that being so, a notice of action need be given. It is said that that must in the first instance depend upon whether s. 139 of the Public Health Act, 1848, can be made applicable to anything done or intended to be done under the Act of 1864: and that depends upon the construction to be put upon s. 2 of that Act,—"This Act shall be executed by the local board subject to the powers and provisions of the Public Health Act, 1848, and of the several Acts supplemental thereto, and of the Local Government Act, 1858, and of any other Act relating to the public health and from time to time in force within the district of Wallasey." I understood Mr. Aspinall to say that no powers could be given to the board under the Public Health Act except such as they would have to exercise within the Wallasey district, and that this landing-stage is wholly without the district and therefore that none of the powers contained in the Public Health Act, 1848, can apply to this landing-stage work. But it must be obvious that, in dealing with this landing-stage, they are acting under the Act of 1864, and when the board are carrying out what that Act authorizes them to do, it is impossible to say that they are not acting under the Act "subject to the powers and provisions of the Public Health Act, 1848." Is s. 139 a "provision" of the Public Health Act, 1848? I think it is, and therefore it is applicable to this work. The cases upon this subject have decided that it is not only that which is rightfully done under the authority of an Act of Parliament that is protected by a clause of this sort, but also that which is bonâ fide intended to be done under it. Indeed, the protection is hardly needed unless the powers given by the Act are exceeded.

Now, two objections were urged by Mr. Aspinall. In the first place, he says the thing complained of here is a mere nonfeasance, and therefore not "an act done." If I rightly understand the judgments in former cases, the rule is this,—where a man is sued in tort for the breach of some positive duty imposed upon him by an Act of Parliament, or for the omission to perform some such duty, either may be an act done or intended to be done under the authority of the Act, and if so done or intended to be done the defendant is entitled to a notice of action. In *Davis* v. *Curling* (1), it was said in argument, "The declaration shews only an omission; the evidence proved no more; and the injury is not produced by any pursuance of the Act." But Lord Denman said (2): "It is clear that the defendant is charged with a tort committed in the course of his official duty: he is charged, as surveyor, with the positive act of leaving the gravel on the road, where it had been improperly placed, for an unreasonable time. On that simple ground I think it clear that he was entitled to notice." Coleridge, J., in *Newton* v. *Ellis* (3), says: "This is not a case of not doing: the defendant does something, omitting to secure protection for the public. He is not sued for not putting up a light, but for the complex act." And Erle, J., in the same case, says: "The cause of action is, the making the hole, compounded with the not putting up a light. When these are blended, the result is no more than if two positive acts were committed, such as, digging the hole, and throwing out the dirt: these two united would make up one act." In *Wilson* v. *Mayor, &c., of Halifax* (4), Kelly, C.B., states the proposition in these terms: "It has been urged on the part of the plaintiff that the charge against the defendants is not of any act done or intended to be done, but of an omission to erect or cause to be erected a fence between the footpath and the goit, and that the omission to do an act is not 'an act done or intended to be done.' Some authorities have been cited on both sides: but we think that, whatever may be the construction which might be put upon the words of the statute if the question arose in this case for the first time, it is now settled by authority that an omission to do something that ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done, within the meaning of these clauses requiring notice of action for the protection of public bodies acting in the discharge of public duties under Acts of Parliament." It would seem from these authorities that, where the plaintiff is suing in tort, nonfeasance is to be considered as "an act done," within such clauses as these.

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(1) 8 Q. B. 286, 289.

(2) 8 Q. B. at p. 292.

(3) 5 E. & B. at p. 124. 1 Jur. N.S. 850

(4) Law Rep. 3 Ex. 114.

But Mr. Aspinall takes another point. He says that, as the anchor was negligently placed out of the limits of the board's jurisdiction, the omission to mark its position could not be a thing done or intended to be done under the provisions of the Act; that is to say, that, though a negligent omission may give them a right to notice, yet for a negligence upon a negligence they are not entitled to notice. That proposition cannot, as it seems to me, be maintained. All the conduct which gave rise to the cause of action was something which was bonâ fide intended to be done by the defendants under the provisions of the Act.

I am of opinion that the plaintiffs cannot maintain their first cause of action; that they might have sustained the second if they had given a notice of action; but that, not having given such notice, they cannot sustain that. And further, I am of opinion that, if they could have maintained the first as well as the second cause of action, yet for want of notice they cannot sustain either.

DENMAN, J. The cause of action here is, not properly buoying an anchor in a navigable river, whereby damage was sustained by the plaintiffs' vessel. On the part of the plaintiffs it was argued first, that, as there was no statutory authority to put the anchor there at all, the defendants must be liable, especially if the anchor was improperly buoyed. It was argued for the defendants, first, that the action would not necessarily lie, though the anchor was placed in a navigable river without authority, because, according to the case of *Rex* v. *Russell* (1), notwithstanding the thing was a public nuisance, if it was beneficial to the public, no actionable wrong was committed by placing it there. I have always considered that that case was practically overruled by *Rex* v. *Ward.* (2) If the defendants had no statutory authority to place the anchor where they did, I should have been disposed to think that the injury sustained by the plaintiffs in this case was an actionable injury. But the case does not rest there. The plaintiffs further contend that, even if the defendants had authority to place the pier, and landing-stage, and anchor where they did, still an action would lie against them if in the exercise of their powers they were guilty of negligence, and damage could be shewn to have resulted from such negligence; and, negligence having been found here, the action is maintainable. I should have been of that opinion also but for the question whether s. 139 of the Public Health Act, 1848, afforded an answer. I am, however, of opinion that a notice of action under that section was necessary.

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(1) 6 B. & C. 566.

(2) 4 A. & E. 384.

The case has been so fully gone into both at the Bar and by my two learned Brethren, that I feel it to be unnecessary to say more than that I entirely concur in the opinions already expressed as to the notice of action, and that I think the first plea should be found for the defendants. But, as the question involved is one of considerable importance, and one which may occur again, I think it right also to say that, in my judgment, looking at s. 7 of the Act of 1864, coupled with s. 8 and the general purview of the Act and of the Acts to be read in connection with it, it is clear that what was done by the defendants was done by them in the execution and under the provisions of the Acts. The words of s. 7 are certainly not very clear; but I agree with the interpretation put upon them by my Brother Brett. I cannot help laying some stress on s. 37 of the Wallasey Improvement Act, 1858 (21 & 22 Vict. c. lxiii), which provides that "the local board may from time to time hire and charter, as well as provide, purchase, and maintain, such steam and other boats, materials, and things, and employ and recompense such persons as shall be necessary for the proper and efficient working of any such ferry as shall be so hired or purchased by the local board under the provisions of the first-recited Act (1) or this Act." The board being thus charged with the power and duty of working the ferries and making and maintaining works and conveniences for that purpose, subject to the consent and approval mentioned in s. 8 of the Act of 1864, and having obtained that sanction, upon the findings in this special case, by which the Court is impowered to draw inferences of fact, I can come to no other conclusion than that the thing here complained of was a "convenience" in connection with the pier and landing-stage, and that the putting down of the anchor was a matter which

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(1) 8 & 9 Vict. c. vi.

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they had authority under the Acts of Parliament to do. Having, however, done this in a manner which the arbitrator has upon sufficient facts found to be negligent, they would, but for the want of a notice of action, have been liable for that negligence.

For these reasons, I agree with the rest of the Court that the defendants are entitled to judgment upon this special case.

Judgment for the defendants.

Attorneys for plaintiffs: *Chester, Urquhart, Bushby, & Mayhew, for Wright, Stockley, & Becket, Liverpool.*

Attorneys for defendants: *Norris, Allens, & Carter.*

END OF MICHAELMAS TERM, 1873.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXVII VICTORIA.

AUSTIN *v.* THE GUARDIANS OF BETHNAL GREEN.

1874
Jan. 17.

Corporation—Board of Guardians—Contract not under Seal—Engagement of Servant—Clerk to the Master of a Workhouse.

The contract for the engagement of a clerk to the master of a workhouse by a board of guardians, must, in order to bind the guardians, be under their seal.

10 CP 405
6 QBD 20
8 QBD 52

The first count of the declaration alleged that, in consideration that the plaintiff would serve the defendants in the capacity of master's clerk at the wages of 52*l.* per annum, with board and lodging for a year from the 28th of October, 1872, the defendants promised to retain him in such service, on the terms aforesaid, for a year. Breach, a wrongful dismissal of the plaintiff from such service during the year.

Second count, similar to the first, except that the service was not alleged to be for any definite period, but until determined by reasonable notice on either side, and complaining of a dismissal without such notice.

Third, money count.

Pleas (inter alia) to the first and second counts, denial of the promise, and to the third count never indebted.

Issues thereon.

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It appeared, at the trial before Denman, J., at the London sittings after Trinity Term, that the defendants had advertised for candidates for the office of clerk to the master of the workhouse, and the plaintiff had applied for the situation. The principal duties of the employment were to keep the workhouse master's books.

The plaintiff was elected by the defendants from among several candidates who likewise applied, and entered on the duties of the office, but was very shortly afterwards informed that his services would not be further required. The defendants contended that his election had been conditional on his subsequently producing a testimonial from former employers, which he was unable to obtain. The plaintiff contended that it was unconditional. It likewise appeared that no contract under seal had ever been entered into by the defendants in relation to the plaintiff's engagement.

The verdict was entered for the plaintiff for 22*l.* 10*s.*, leave being reserved to the defendants to move to enter it for themselves, on the ground that a contract under seal was necessary to render the defendants liable, they being a corporation.

A rule nisi had been obtained accordingly, against which

Warton and *Poulter* shewed cause. The old rule as to the necessity for a seal in order to bind a corporation has been very much impaired by the decisions on the subject. Two principal classes of exception seem to have been made—one in favour of trading corporations, and the other in respect of acts which in relation to the purposes for which the corporation exists must be acts of an ordinary every day character. It is submitted that the latter head really contains the guiding principle on the subject. It is not so much upon any peculiar consideration connected with trade that the cases coming under the first head are really based, as upon the principle that acts which form part of the usual routine of the business of a corporation do not require the use of the seal: *Arnold* v. *Mayor of Poole* (1), *Mayor of Ludlow* v. *Charlton* (2), *South of Ireland Colliery Company* v. *Waddle.* (3)

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(1) 4 M. & G. 860.

(2) 6 M. & W. 815.

(3) Law Rep. 3 C. P. 463; Law Rep. 4 C. P. 617.

In fact the modern doctrine may be said to be that the seal is only necessary to acts of a solemn and extraordinary character, to which the formality of a seal is appropriate; as for instance, when the guardians are making an important contract affecting their property or entailing serious pecuniary liabilty. Such an act as appointing a person to a trifling subordinate appointment in a workhouse, at a salary of a pound a week, is not of this character. In Comyn's Digest, tit. Franchise, F. 13, it is said that a corporation may "give a personal command or do small acts without deed, as it may retain a servant, a cook, butler, &c." See also *Horn* v. *Ivy.* (1) The case of *Dyte* v. *Guardians of St. Pancras* (2) is distinguishable on the ground that the office there was of more consequence, being that of medical officer.

[They also cited *Church* v. *Imperial Gas Light and Coke Co.* (3)]

Dixon, supported the rule. The decisions with regard to trading corporations are inapplicable: this is more analogous to the case of a municipal corporation. With respect to this class of corporations the rule appears to be that the seal is necessary except in the case of services of a menial or trifling character, and cases of immediate necessity: *Diggle* v. *London and Blackwall Ry. Co.* (4); *Finlay* v. *Bristol and Exeter Ry. Co.* (5) The present case does not fall within either of the heads of exception. The duties of the plaintiff involved the keeping of very complicated books of account, in accordance with the requirements of the Local Government Board. The office was one that the guardians could not create without the sanction of the Local Government Board. See the Consolidated Order of the Poor Law Commissioners of the 24th of July, 1847, article 153.

[He was then stopped by the Court.]

COLERIDGE, C.J. This action is brought by the plaintiff for wrongful dismissal from the situation of assistant or clerk to the master of the workhouse, the duties of which situation appear to have been principally the keeping of accounts of a somewhat com-

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(1) 1 Ventr. 47.
(2) 27 L. T. (N.S.) 342.
(3) 6 A. & E. 846.
(4) 5 Ex. 442; 19 L. J. (Ex.) 308.
(5) 7 Ex. 409; 21 L. J. (Ex.) 117.

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plicated nature, requiring some amount of skill and capacity. The verdict was entered for the plaintiff, leave being given to move to enter it for the defendants. It is only, in the view we take, necessary to consider one of the grounds upon which such leave was reserved, viz. that there was no contract for the employment of the plaintiff under seal. The defendants are a corporation, at any rate for purposes connected with the relief of the poor, and have a common seal. The rule of law is clear that primâ facie and for general purposes a corporation can only contract under seal, for the proper legal mode of authenticating the act of a corporation is by means of its seal. On this rule, however, certain exceptions have been engrafted. The principle that governs these exceptions is conveniently stated in the case of *Church* v. *Imperial Gas Light Co.* (1), by the Court of Queen's Bench, which statement is adopted by the Court of Exchequer in the case of *Mayor of Ludlow* v. *Charlton.* (2) It is there stated that "Wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed: hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." The question is whether the present case comes within the rule as laid down in those cases. Now the nature of the employment or office in which the plaintiff was employed in this case was so far considered of importance that by the orders of the Poor Law Board, which have the effect of an Act of Parliament, the assent of one of the departments of the State was made necessary to the constitution of such an office. It is very difficult to lay down any exact general rule as to what employments would be on one side of the line, so as to necessitate a contract under seal, and what on the other. A number of cases have been cited, but in each of them the decision turned on the particular circumstances connected with the office or employment, these being different in each case. This particular case has never been decided upon, and we are of opinion, looking to all the circumstances connected with it, that the employment was not one which falls within the exceptions to the general rule with regard

(1) 6 A. & E. 846, at p. 861.

(2) 6 M. & W. 815, at p. 822.

to contracts made by corporations, and therefore that the rule should be made absolute.

KEATING, J. I am of the same opinion. The rule on this subject is laid down in the case of *Mayor of Ludlow* v. *Charlton* (1), and that statement of it has the sanction of the very great authority of Sir Edward Vaughan Williams, who adopts it in his edition of Williams' Saunders, vol. i., p. 616. The exceptions, as laid down by that rule, are, first, cases so constantly recurring, or of so small importance, and so little admitting of delay, that to require in every such case the previous affixing of the seal would be greatly to obstruct the every day convenience of the body corporate, without any adequate object; secondly, the instances of trade corporations.

It is sufficient for me to say that I do not think the present case comes within either of those two heads of exception.

DENMAN, J. I am of the same opinion. The general rule is, no doubt, that a corporation can only be bound by a contract under seal, and it does not seem to me that the present case is brought within any of the exceptions to that rule.

Rule absolute. (2)

Attorney for plaintiff: *Holmes.*
Attorney for defendants: *Howard.*

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(1) 6 M. & W. 815.

(2) Compare as to the distinction between the question, whether there has been a due appointment to an office for some purposes, and the question of liability by way of contract *Smart* v. *Guardians of West Ham Union* (10 Exch. 867; 11 Exch. 867).

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Jan. 29.

NEWELL *v.* VAN PRAAGH.

Imprisonment for Debt—Debtors Act, 1869 (32 & 33 *Vict. c.* 62) *s.* 5—*Composition with Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Default in Payment of Composition—Revival of Creditor's original Rights and Remedies.*

11 L.J. 156

1 C.P.D. 113–
119.

A judgment having been recovered against the defendant for a sum of money and remaining unsatisfied, the plaintiff applied to a judge at Chambers to commit the defendant to prison under the 5th section of the Debtors Act, 1869. The judge made an order for the payment of the debt by monthly instalments. After three of such instalments had been paid, proceedings were taken by the defendant for the purpose of making a composition with his creditors under the 126th section of the Bankruptcy Act, 1869; and a resolution of the creditors was duly passed accepting a composition upon the defendant's debts, payable by two instalments. Default was made in the payment of the first instalment of the composition to the plaintiff, and instalments under the judge's order having by that time become due and not having been paid, the plaintiff applied again at Chambers for the committal of the defendant to prison for non-compliance with the judge's order:—

Held, that the effect of the default in payment of the composition was to remit the plaintiff to the position he occupied before the proceedings in respect of the composition took place, and that, consequently, the order might be made for the defendant's committal to prison for non-compliance with the judge's order.

Edwards v. *Coombe* (Law Rep. 7 C. P. 519), and *Slater* v. *Jones* (Law Rep. 8 Ex. 186), discussed.

This was an application to commit the defendant to prison under the 5th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62).

The plaintiff had recovered a judgment against the defendant for a debt of 84*l.*, and the debt remaining unsatisfied, the plaintiff had applied to Baron Cleasby at Chambers under the 5th section of the Debtors Act to commit the defendant. The learned judge made an order for the payment of the debt in monthly instalments of 7*l.* 10*s.* each. Three of such instalments had been paid when proceedings were taken by the defendant for the purpose of effecting a composition with his creditors, under the 126th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); and a meeting of creditors having been called, a resolution was duly passed in accordance with that section—from which, however, the plaintiff dissented—by which the creditors agreed to accept a composition on the defendant's debts of 2*s.* in the pound, payable by two instalments, one at four months' and the other at eight months' date. The plaintiff's debt was included in the statement of the defendant's liabilities submitted to the meeting of creditors. Default was made in payment to the plaintiff of the first instalment of the composition, and thereupon, instalments under the judge's order having by that time become due and not having been paid, the plaintiff applied to Baron Martin at Chambers to commit the defendant for non-compliance with such order. The matter was referred by the learned judge to the Court. A rule nisi had been accordingly obtained for the committal of the defendant, against which

Croome shewed cause. He contended that the defendant could not be committed for non-compliance with the order for payment of the debt by instalments, on the ground that that order was rendered of no effect by the subsequent acceptance of the composition.

Meadows White supported the rule. He contended that the effect of the default in payment of the composition was that the plaintiff was remitted to his former rights and remedies, and that the order of Baron Cleasby still remaining unrescinded could be enforced by the committal of the defendant (1).

[The cases cited are all referred to in the judgment of the Court.]

COLERIDGE, C.J. I am of opinion that this rule should be made absolute. The facts of the case, as I understand them, are as follows. The defendant owed the plaintiff a sum of money, and the plaintiff having recovered judgment for the debt, Baron Cleasby made an order that the judgment debt should be paid in monthly instalments of 7*l.* 10*s.* Three of these instalments having been paid, proceedings were taken for the liquidation of the defendant's affairs by a composition under the 126th section of the Bankruptcy Act, 1869. A meeting of the creditors took place, at which the plaintiff attended, and a resolution was come to, from

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(1) It was contended by the defendant's counsel that it was not sufficiently shewn by the affidavits that there was ability on the defendant's part to pay, such ability being necessary to an exercise of jurisdiction under the 5th section of the Debtors Act, 1869; but the Court were of opinion that there was such ability. The facts and arguments with respect to this question are omitted as not being material to the point reported.

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which the plaintiff dissented, but was outvoted, that a composition should be accepted at the rate of 2*s.* in the pound, to be payable by two instalments. As regards the plaintiff, there was a failure to pay the first instalment, and on such default hostile proceedings were immediately taken, and an application made to commit the defendant. It might possibly have been contended, if such proceedings had not been taken, and payment of the instalment had been tendered before the creditor had taken any steps to replace himself in his former position, that the composition was still available; but in the state of things that has arisen it is unnecessary to give any opinion on the point. Proceedings were immediately taken, and an application made to Baron Martin at Chambers, and he has referred to the Court the question whether an order should be made enforcing the payment of the monthly instalments now due. The question therefore arises whether, under these circumstances, there has been a revival of that right of the creditor which he had undoubtedly foregone by reason of having been made a party, though an unwilling party, to the composition. This question depends on the 5th section of the Debtors Act and the 126th section of the Bankruptcy Act, 1869. The latter section deals with compositions with creditors, and the 7th clause of the section provides as follows: "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors." By the resolution accepting the composition, to which the creditor is made a party, though it may be unwillingly, the section says the creditor shall be bound, but it does not say that the composition is to extinguish or destroy any rights that he may possess; and inasmuch as he is to be bound, the result is that, in effect, his rights and remedies are suspended by the composition. There have been two decisions, one in this court and one by the Lords Justices, in which it has been held that the mere agreement for the composition does not prevent the continued existence of the rights and remedies of the creditor. The case of *Edwards* v.

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(1) Law Rep. 7 C. P. 519.

Coombe (1) decided that when a debtor's affairs had been made the subject of arrangement by composition, and there had been default in the payment of the composition, the right of the creditor, which had been suspended, revived, and he might bring an action for the original debt. The case of *Edwards* v. *Coombe* (1) came under the consideration of the Court of Appeal in Chancery in the case of *In re Hatton* (2), where the circumstances were identical with those of *Edwards* v. *Coombe.* (1) Both the Lords Justices seem not only to have been of opinion that they were bound by the judgment of this Court, but to have agreed with it. The point decided in both these cases appears to be that, so far as the right of action is concerned, default in payment of the composition remits the creditor to his original position. The question now before us is not precisely the same, but I am of opinion that the principle of these decisions carries the principle that must govern the present case with it. The 5th section of the Debtors Act provides that, "subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court." There is, likewise, a provision that the court may direct a judgment debt to be paid by instalments. Here there had been an order for payment of the judgment debt by instalments, and therefore there was a debt due for which there was a particular statutory remedy prescribed by this section. The operation of the remedy was suspended by the agreement for acceptance of the composition, and would have continued suspended if the composition had been carried out. It was not so carried out, and the effect was that the judgment debt revived. That seems to me to shew that the creditor was remitted to the same position as that in which, but for the composition, he would have been. It appears to me that the true construction of the statutes is, that if a creditor have taken proceedings for the recovery of his debt, and those proceedings have been suspended by the effect of the composition, when the composition has become ineffectual he is to be placed in

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(1) Law Rep. 7 C. P. 519.

(2) Law Rep. 7 Ch. 723.

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the same position as he occupied before it was made, and can resume the proceedings, from the further prosecution of which he was restrained by reason of the composition. It is then as if the composition never had any existence. It is worthy of observation, though it does not directly affect the construction of the bankruptcy sections, that in the 5th section of the Debtors Act it is provided that no imprisonment under the section is to operate as an extinguishment of the debt, or deprive the creditor of his right to take out execution against the lands or goods. In the present case the judgment remaining unsatisfied, the creditor would clearly, according to the decisions, have had a right to issue execution for the whole amount against the goods, and it seems common sense that he should not be the less entitled to enforce an order for satisfaction of the debt by several payments.

KEATING, J. I am of the same opinion. I agree so completely with the reasons expressed by my Lord that I do not think it necessary to add anything.

BRETT, J. The question seems to me to be, whether under the circumstances of the present case, upon the ordinary proof of the debtor's ability to pay, the Court ought to make an order for his committal. This question depends upon the true construction of the 126th section of the Bankruptcy Act, 1869, and of the 5th section of the Debtors' Act, 1869. The plaintiff in the present case had obtained judgment for a sum of about 84*l*., and had gone before a judge at Chambers to apply for the committal of the defendant. The judge made an order for the payment of the debt by instalments, some of which are still due. Such being the state of things, the debtor called a meeting of his creditors under the Bankruptcy Act, and it was agreed by a resolution, which was binding under the provisions of that Act upon the plaintiff, that a composition should be accepted, to be paid by two instalments. Default was made in the payment of the first instalment to the plaintiff, and the plaintiff then went before a judge at Chambers and applied again for an order of committal. Now with respect to the construction of the Bankruptcy Act, the case of *Edwards* v. *Coombe* (1) shews that, when a resolution for a composition has

(1) Law Rep. 7 C. P. 519.

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been come to by the creditors in accordance with the terms of the Act, the creditor cannot for a time sue on the original debt, but, when there has been a failure to pay the composition, he can. That was said by this Court to be the construction of the Act, and the Lords Justices, in the case of *In re Hatton* (1), not only followed that decision, but expressed their opinion to the same effect. I think it necessary to add some few remarks on the subject to what my Lord has said, because a case has just been brought to my notice which was not discussed in the argument, viz., the case of *Slater* v. *Jones* (2), which was decided by the Court of Exchequer, subsequently to both the two cases that have been referred to, and in which they were both commented upon.

There the creditor brought his action for the original debt, and there was a plea of a composition under the Bankruptcy Act, 1869, to which the plaintiff replied that the time for the payment of the composition had not arrived. The Court of Exchequer seem to have had the difficulty urged upon them, that if the decision in *Edwards* v. *Coombe* (3) was, that according to the common law the right of action was suspended, it would follow that the debt was gone for ever. The Court said that they did not think it necessary to dissent from *Edwards* v. *Coombe* (3), and Bramwell, B., says: "I think we can assent to both decisions, and yet hold the plea good, thus: either this resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the event happens, whereby it is defeated (i.e. the debtor's default), a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors, that all will forbear to sue until default, the other by the debtor, that in case he fails to pay the composition at the time agreed, he will pay the whole debt." It seems to me that we need not disagree with what was said by the Exchequer in *Slater* v. *Jones* (2), any more than they dissented from the decision in *Edwards* v. *Coombe*. (3) It seems to me that the decision in *Edwards* v. *Coombe* (3) turned upon the construction of the Bankruptcy Act, and not on the common-law doctrine of the suspension of a remedy; that the meaning of the statute was that the creditor

1 CPD. 114

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(1) Law Rep. 7 Ch. App. 723.
(2) Law Rep. 8 Ex. 186.
(3) Law Rep. 7 C. P. 519.

should not be entitled to go on with an action until the composition was due, and that if paid when due it should extinguish the debt; but that, if it were not paid, it should be just as if there had been no composition, and the creditor should be entitled to the usual remedies, and be generally in the same position as if the resolution for the composition had never passed. In the present case the original debt was merged in the judgment debt. The plaintiff had become a judgment creditor with the right to issue execution against any goods the defendant might have for the whole amount, but he had an additional remedy in case he should fail to realise the debt by execution against the goods, viz. to apply to a judge at Chambers to commit the defendant's person to prison. He had so applied, and the judge had made an order for payment by instalments. The judgment and the order were both in force when the resolution for the composition was passed. If the plaintiff is to be remitted by the default in payment of the composition to the state of things that previously existed, he is remitted to the position of a judgment creditor with an order for payment of the debt by instalments. I do not think that order did away with the original judgment debt, or the remedy by execution for the whole amount against the goods, for it is expressly provided that an imprisonment under the 5th section of the Debtors Act shall not operate as an extinguishment of the debt, by which I understand that, if the defendant came into possession of property, the existence of the order and the imprisonment would not prevent execution against the goods. It follows that in one sense of the word the judgment debt and all the remedies of the plaintiff were revived, that is, that he became able again to enforce them. He is, therefore, entitled, it seems to me, to go before a judge at Chambers and enforce the order for payment by instalments which is still in existence. For these reasons, I am of opinion that we have power to make the order for which the plaintiff applies.

DENMAN, J. I am of the same opinion. The plaintiff having obtained judgment against the defendant for a sum of money, Baron Cleasby made an order that the amount of the judgment debt should be paid by instalments of 7*l.* 10*s.* each. That order is still unrescinded and is now in force, unless the bankruptcy proceedings prevent its having effect. Now the 126th section of the Bankruptcy Act, 1869, enacts that a composition accepted by the required majority shall be binding on the creditor, but the statute must have meant that there should be reciprocity, and that it should only bind the creditor if the debtor performed his part according to the terms of the arrangement. In the present case default was made by the defendant in payment of the first instalment of the composition to the plaintiff. This Court and the Court of Appeal in Chancery have both held that in such a case the right of action for the original debt is not gone. I do not collect from the judgment in *Slater* v. *Jones* (1) that that case at all overrules the two former cases. There may be certain expressions in that case which qualify the mode of stating the rights and position of the creditor in such a case as this, but there was nothing in substance contradictory between the decisions. The question then is, whether the decision in *Edwards v. Coombe* (2) does not apply here. It seems to me that it does.

Whatever may be the strictly legal mode of describing the effect of default in payment of the composition by the debtor upon the rights of the creditor, whether it be correct to speak of their reviving or his being remitted to them, does not appear to me to be very material; substantially, the defendant is estopped from setting up the terms of that composition which he has wholly neglected to carry out, and it does not lie in his mouth to take advantage of it to defeat the creditor's previous right. It seems to me, therefore, that the order of Baron Cleasby is still in force, and that the defendant is liable to be committed for non-compliance with the terms of it.

COLERIDGE, C.J. I should wish to add that I do not see any inconsistency between our present decision and the views expressed by the Court of Exchequer in *Slater* v. *Jones*. (1) I do not put my judgment on the ground of a suspension of the right of action at common law during the pendency of the composition, which might possibly amount to an extinguishment of the remedy altogether, but wholly on the ground that the true construction of the Act of Parliament is, that if the composition be not carried

(1) Law Rep. 8 Ex. 186.

(2) Law Rep. 7 C. P. 519.

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out the creditors shall be remitted to their former rights and remedies. That seems to have been the view of the Lord Chief Baron in *Slater* v. *Jones* (1), for he says at the end of his judgment, "I see no difficulty in holding that the present actions will not lie, although in a certain event the original debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for the debt, and yet the same debt could afterwards be sued for if the certificate were set aside for fraud."

Rule absolute.

Attorneys for plaintiff: *Jones, Arkcoll, & Jones.*
Attorney for defendant: *Brown.*

Jan. 17.

NEILD AND OTHERS, PETITIONERS; BATTY, RESPONDENT.

Corrupt Practices (Municipal Elections) Act, 1872 (35 *&* 36 *Vict. c.* 60)—*Reg. Gen., Michaelmas Term,* 1872, *No.* 7—*Delivery of List of Votes objected to.*

Where a list of the votes objected to, on a petition under the Corrupt Practices (Municipal Elections) Act, is not delivered within the time prescribed by the 7th of the General Rules made under the Act, the Court has no power to allow evidence to be given against the validity of votes or to allow a list to be subsequently delivered.

THIS was a petition against the return of the respondent at the municipal election for the city of Manchester.

The hearing of the petition was fixed for the 20th of January, and the list of the votes intended to be objected to, and the heads of objection to each vote, required by the 7th of the General Rules for the effectual execution of the Corrupt Practices (Municipal Elections) Act, 1872, was delivered by the petitioners too late, being delivered after the time prescribed by such rule.

A rule nisi had been obtained that the petitioners might be at liberty to give evidence against the validity of the several votes specified in the list which was delivered as above mentioned, upon the several heads of objection specified in such list, in the same way as if such list of objections had been duly filed and delivered within the time required by the 7th rule, and that the said list of objections might be duly filed and delivered nunc pro tunc. (1)

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(1) Law Rep. 8 Ex. 186.

Herschell, Q.C., shewed cause. The Court has no power under the 7th rule to grant this application. The powers given by the rule apply only to amendment of a list which has been delivered in time, and not to a case where no such list has been delivered.

Ambrose, supported the rule. The construction sought to be placed on the words of the rule is too narrow. No doubt the rule assumes that in general a list will have been delivered, but the principle is precisely the same where no list has been delivered, and it is wished to take objection to votes, as where a list having been delivered, it is wished to take objection to votes not mentioned in such list. Quoad the fresh names objected to, there is no list in any case. The case is substantially the same as if all the names now objected to had been omitted from a list delivered in due time, and it was now sought to amend the list by adding such names.

[KEATING, J. The Court would have a discretion to examine the circumstances under which particular names were omitted, and might or might not permit an amendment. That is a very different thing from a provision giving them power to allow the whole list to be delivered after the time.]

No injustice can arise to the opposite party from the wider construction of the rule, for there is power to direct a postponement of the trial, if necessary; whereas it is a great hardship to the petitioner if, from a mere slip, the principal object of his petition is frustrated.

COLERIDGE, C.J. I think we have no power to make such an order as is asked for. The list of objections in the present case was not delivered in time, and that being the case, I am of opinion that on the true construction of the rule we have no jurisdiction to extend the time. The concluding words of the rule are those relied on by the petitioners, but the terms of it appear to me clearly to shew that an amendment of the list, and not the extension of the time for the original delivery of a list, was contemplated by the rule. I feel bound also to say for myself that, if I thought otherwise as to the construction of the rule, this is not, in my opinion, an application which, as a matter of discretion, ought to be encouraged. The petitioners knew, as long ago as the 22nd of November, that there was to be a petition; and the hearing having been fixed for the 2nd of January, they drive off the delivery of the list of objections to the very last moment.

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(1) The 7th rule is as follows:—

"When a petitioner claims the office for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election shall, six days before the day appointed for trial, deliver to the Master, and also at the address (if any) given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote; and the Master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court of Common Pleas or a judge at Chambers, upon such terms as to the amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

KEATING, J. I am of the same opinion. I most strongly agree with the observations of my Lord with respect to the desirability of keeping parties to the time prescribed by the rule. It is common knowledge that, where parties are bound to give any information, such as is contained in these lists of objections, to the opposite party within a certain time, they drive off doing so until the last possible moment, so that the opposite side may have the shortest possible time for inquiry. I think that our decision will have the effect of making such a mode of proceeding perilous, and of causing people to be more anxious to deliver the requisite information in due time, and less desirous of concealing their case from their adversaries.

DENMAN, J. It is not denied that the delivery of the list of objections was too late, and the only question, therefore, is whether we have power to allow it to be delivered now. I agree with the rest of the Court that the latter portion of the rule relied upon does not apply when no list has been delivered at all within the specified time. The intention of the rule appears to me to be that the list should be delivered within a certain time, and the power to allow of amendments seems to me to be given as a consequence of the strictness with which parties are required to deliver the original list within a certain time. Because the rule is made so strict in order that parties whose conduct is impeached may have due notice of what is objected to, therefore, lest injustice in particular cases should be done, a limited power of amendment is given—a power not to extend the time for delivery of the list, but to allow of additions to it.

Rule discharged.

Attorneys for petitioners: *Dangerfield & Son, for Hall.*
Attorneys for respondent: *Cooke & Talbot.*

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4ChD 72
736-7-9,
2ChD 242
252, 264

Description of Subject-matter of Agreement—Falsa Demonstratio—Liquidated Damages.

The plaintiff entered into an agreement for the transfer of his tenancy in a public-house, and the sale of the goodwill thereof to the defendant. The subject-matter of the agreement, which was in writing, was therein described as "the house and premises he now occupies, known by the sign of the 'White Hart.'" There was a coach-house which belonged to the "White Hart," and which, at the time of the making of the agreement, was not in the occupation of the plaintiff, but of one S., who held it as tenant to the plaintiff for a period which had not expired at the time fixed for the completion of the transfer by the agreement. The agreement contained a variety of stipulations with regard to the transfer of the licences, the payment of rates and taxes, and the purchase of fixtures, furniture, and stock at a valuation by the defendant, and concluded as follows: "If either party shall refuse or neglect to perform all and every part of this agreement, they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of 100*l.* as damages, and recoverable in any of Her Majesty's courts of law." The defendant refused to perform the agreement on the ground that it included the coach-house, and that the plaintiff could not perform his part, not being able to deliver up possession of that portion of the premises on the day fixed for completion, and the plaintiff accordingly brought his action to recover the 100*l.* as liquidated damages:—

Held, that the words "he now occupies" formed an essential part of the description of the subject-matter of the agreement, and could not be rejected as falsa demonstratio, and consequently that the agreement did not include the coach-house and the plaintiff was entitled to succeed; but that the 100*l.* was not liquidated damages but a penalty, and therefore the plaintiff could only recover the damages found by the jury to have been actually sustained by him.

Reilly v. *Jones* (1 Bing. 302) and *Lea* v. *Whitaker* (Law Rep. 8 C. P. 70), discussed.

DECLARATION, after setting out an agreement for the transfer of the tenancy of a public-house, and sale of the goodwill and fixtures,

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&c., possession to be given on or before the 8th of January, 1873, and alleging that the defendant had refused to perform all and every part of the said agreement, claimed the sum of 100*l.* as liquidated damages for non-performance of the agreement.

The 4th plea (by which the point material to the present report was raised) stated that before and at the time of the making of the said agreement a certain coach-house, then part and parcel of the said premises in the said agreement mentioned, had been and was let to one Samson for a term extending long beyond the said 8th of January, 1873, and that at the said time appointed for the completion of the said agreement the said Samson was possessed of the said coach-house for the said term, and was in actual occupation thereof, and that the plaintiff was then unable to give the defendant possession of the said coach-house.

Issue thereon.

At the trial before Honyman, J., at the Middlesex sittings during Trinity Term, the facts proved were as follows: The defendant was tenant of a public-house called the 'White Hart,' at Mitcham. The plaintiff and defendant had entered into a written agreement dated the 3rd of December, 1872, which was substantially as follows:—" The said Alfred Ernest Magee doth hereby agree to let unto the said James Lavell the house and premises he now occupies, known by the sign of the 'White Hart,' with stabling and garden, situate and being at Mitcham Green, for the sum of one hundred pounds as goodwill." The agreement, which was somewhat inartificially framed, consisted of a printed form with blanks to be filled up, and the words "he now occupies" were in print. It went on to provide for the sale by the plaintiff of the household furniture, fixtures, and effects on the premises at a valuation, and the assignment of the licences, and the purchase by the defendant at a valuation of stock on the premises, not exceeding as follows: porter, nine butts, ale, twelve barrels, wines, spirits, and compounds, one hundred pounds. It was further agreed that the valuations, assignment of licences, and time of delivery up of possession should be on or before the 8th of January, 1873, at which time all arrears of rents, taxes, and gas-light rent, and other incumbrances due or growing due were to be duly paid, or allowed for in the settlement, and that the plaintiff should not, during the defendant's tenancy, carry on the business of a licensed victualler within the distance of two miles from the premises, under a penalty of 100*l.* The purchase money was to be paid by the defendant at the time of taking possession, and the sum of 50*l.*, paid on the making of the agreement as a deposit, was to be allowed for at the same time, one moiety of the expenses being payable by each party. And it was finally agreed that "if the said James Lavell shall not be accepted by Mr. James Ward (the landlord) at the rent of 124*l.* per annum or under, the deposit shall be returned, and this agreement shall be null and void, and that if either party shall refuse or neglect to perform all and every part of this agreement, they hereby promise and agree to pay to the other, who shall be willing to complete the same, the sum of 100*l.* as damages, and recoverable in any of Her Majesty's courts of law."

At the time of the making of this agreement one Samson was tenant to the plaintiff of the coach-house and harness-room attached to the "White Hart," under an agreement dated October, 1872, by which it was agreed that Samson should hold at a rent of 6*l.* for three years, subject to a three months' notice to quit, in the event of a sale of the "White Hart" by the plaintiff.

The tenancy had not been determined at the time for completion under the agreement. It was proved that at the time of the negociation of the bargain, the defendant was shewn over the premises, the name of Samson being painted up over the coach-house as carrying on business there as an omnibus proprietor, and that the defendant knew he occupied the coach-house. At the time of the original letting by Ward to the plaintiff, Samson was tenant of the stabling and coach-house, and such letting was made subject to that tenancy which expired at Christmas, 1872, but had been renewed by the agreement of October, 1872. At the time of the making of the agreement of the 3rd of December the plaintiff was not in occupation of all the garden, some of it being underlet, and this was stated to the defendant, but it was agreed with regard thereto that the plaintiff should make arrangements for determining the tenancies before completion under the the agreement, which he accordingly did, and was in a position to deliver possession to the defendant of all but the coach-house. The defendant was offered possession of the coach-house at Lady Day if he would complete, but he insisted that the agreement included immediate possession of that as well as the rest at the time fixed for completion, and, as the plaintiff could not give such possession, refused to complete. It was contended by the defendant that the 100*l.* was a penalty, and not liquidated damages, and the jury assessed the actual damages at 30*l.* On these facts the verdict was entered for the plaintiff for 100*l.*, leave being reserved to the defendant to enter it for himself on the ground that the coach-house and harness-room were included in the agreement of the 3rd of December, and that the plaintiff was unable to deliver the same to the defendant, or to reduce the damages to 30*l.*, the Court to draw inferences of fact. A rule nisi had been obtained accordingly. (1)

Montagu Chambers, Q.C., and *McMahon*, shewed cause. The question is whether the coach-house was included in the agreement. The true construction of the agreement is that it was not. The words, "he now occupies," form an essential part of the description of the subject matter, and cannot be rejected as falsa demonstratio. The construction would be the same whether the parol evidence is admissible or not. It is clearly admissible so far as is necessary to identify the subject-matter. If it be admitted, it is clear that the intention of the parties was that the agreement was to include only so much of the premises as the plaintiff himself occupied and was in a position to give possession of.

The sum of 100*l.* mentioned in the agreement must be construed as liquidated damages, and not a penalty. The case of *Reilly* v. *Jones* (2) is on all-fours with the present case, the agreement in that case being substantially identical with that in the present case. It is stated in Mayne on Damages, 2nd ed. p. 104, that the doctrine of *Reilly* v. *Jones* (2) is overruled, but there is no case which supports that proposition, and *Reilly* v. *Jones* (1) was recognised as being good law in the case of *Lea* v. *Whitaker*. (2)

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(1) Some of the parol evidence given at the trial as to the occupation of the premises, and what took place between the parties, was objected to, and the rule was also moved for a new trial on the ground of the misreception of evidence; but it appeared that the understanding upon which leave was reserved at the trial was that the Court should consider the case, with or without the evidence, according as they should deem it admissible or otherwise, and should direct how the verdict was to be entered without the necessity of a new trial.

(2) 1 Bing. 302.

[COLERIDGE, C.J. The judgment in *Reilly* v. *Jones* (1) went to a very great extent on the doctrine that the use of the words "liquidated damages" was conclusive. That doctrine has clearly been overruled by *Kemble* v. *Farren* (3), which is a leading authority on the subject. The general principle of law appears to be that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty.]

4 Ch D. 72
21 Ch D 204

The terms of the agreement may well admit of the hundred pounds being considered as imposed as liquidated damages in the event only of total refusal to perform the contract; if so, the case is brought within the principle that where there is one event only on which the money is to become payable it is to be regarded as liquidated damages.

[COLERIDGE, C.J. The weakness of that construction is that it gives no meaning to the words "and every part of this agreement."]

It is submitted that those words are only a tautological mode of expression, and what is meant is, that if all the contract be not performed the 100*l*. is to be payable.

[KEATING, J. If you cannot sustain that construction of the contract the case clearly comes within the principle upon which a sum is to be treated as liquidated damages and not a penalty. Suppose the plaintiff had neglected to pay a small sum for rates or taxes, or the defendant had refused to purchase one bottle of spirits out of the stock, could it be contended that the 100*l*. could be recovered as liquidated damages?

DENMAN, J. The words "and recoverable in any of her Majesty's courts of law," appear pro tanto to be in your favour, for if the 100*l*. be a penalty no meaning is given to them.]

[They also cited on this point *Sparrow* v. *Paris* (4); *Betts* v. *Burch* (5); and *Sainter* v. *Ferguson*. (6)]

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(1) 1 Bing. 302.

(2) Law Rep. 8 C. P. 70.

(3) 6 Bing. 141.

(4) 7 H. & N. 594; 31 L. J. (Ex.) 137. 8 Jur NS 391

(5) 4 H. & N. 506; 28 L. J. (Ex.) 267.

(6) 7 C. B. 716, 730; 18 L. J. (C.P.) 217.

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Murphy and *Bray* supported the rule. So far as the agreement is unambiguous the parol evidence is inadmissible. It is contended that the words "he now occupies" are merely descriptive, and must be rejected as falsa demonstratio. There is a perfectly plain description of the subject-matter, viz. the house and premises known as the "White Hart." To any person reading the description it would include all that formed part of the premises known as the "White Hart," and clearly the coach-house formed part of those premises. The words "he now occupies" are mere description, and there being a plain, unambiguous identification of the subject-matter without them, the parol evidence as to the occupation of the premises was not admissible. The word "stabling" would also certainly, by a reasonable construction, include the coach-house. The words "he now occupies" are in print, and are merely common form. Moreover the word "occupies" may mean "occupation by a tenant." The contrary construction is unreasonable, for it obviously was not the intention of the parties that the defendant should not ultimately have possession of the coach-house, which formed an integral part of the establishment he was purchasing. The plaintiff himself seems to have admitted that he was entitled to possession of it at some time. [They cited on this point *Doe* v. *Galloway* (1); *Lyle* v. *Richards* (2); *Doe* v. *Carpenter* (3); *West* v. *Lawday* (4); *Stukeley* v. *Butler* (5); *Doe* v. *Hubbard*. (6)]

[COLERIDGE, C.J. With respect to the admission of parol evidence, Lord Wensleydale's dictum in *Baird* v. *Fortune* (7) seems to exhaust the matter. He says: "No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect, but such evidence is always admissible to shew the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument."]

With respect to the second point it is clear this was a penalty. *Davies* v. *Penton* (8) shews that the words "recoverable in any court of law," will not prevent the sum mentioned being a penalty.

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(1) 5 B. & Ad. 43.

(2) Law Rep. 1 H. L. 222.

(3) 16 Q. B. 181; 20 L. J. (Q.B.) 70.

(4) 11 H. L. C. 375.

(5) Hob. 168.

(6) 15 Q. B. 227; 20 L. J. (Q.B.) 61.

(7) 4 Macq. H. L. 127, at p. 149.

(8) 6 B. & C. 216.

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Coleridge, C.J. I am of opinion that the rule, so far as entering the verdict for the defendant is concerned, should be discharged. The question as to this point arises on the fourth plea and turns upon the construction of the agreement of the 3rd of December. The subject-matter of the agreement is described as "the house and premises he now occupies, known as the 'White Hart,' with stabling and garden." There were certain premises situated at Mitcham, consisting of what may be termed the "White Hart" proper, that is to say, the inn itself, and the yard, coach-house, stabling, garden, and other premises connected therewith. The plaintiff did not occupy all these premises. He did not occupy the whole of the garden, or the stabling and coach-house, but he was in a position to give possession and complete the agreement as to all but the coach-house. With respect to the garden, no question at present arises. The coach-house was in the possession of Samson, and the whole question is with respect to that. If the description of the subject-matter of the agreement is to be construed as including it, then the defendant is entitled to succeed; if, as excluding it, then the plaintiff is entitled to succeed. It was argued very strongly that the Court ought to reject the words "he now occupies" in the description, and to look only to the words "known as the 'White Hart,'" and that the word "stabling" must be taken to include the coach-house. If it were correct that we ought to reject the words "he now occupies," there would be considerable force in the defendant's argument, though I am not sure that it would be conclusive. But I am unable to see on what principle we are bound to reject the words in question. It was urged that these words were printed and were merely common form. It appears to me a strange doctrine that words of clear and sufficient description in themselves are to be rejected or treated as of less weight because they are in print, and it is one to which, speaking for myself, I cannot assent. It does not seem to me that these words are, as contended, merely "falsa demonstratio." The case may be considered either apart from the extrinsic evidence of what took place between the parties on the negociation of the bargain, which was objected to as inadmissible, or in connection with such evidence. Now, considering the agreement in the first instance, apart from such evidence, it seems to me that the words "he now occupies" are operative words which cannot be rejected. It therefore follows that extrinsic evidence was necessarily admissible so far as to shew what was in fact the subject-matter to which the words were applicable. On looking to such evidence, it is clear that there was a perfectly sufficient subject-matter to which they applied as a description and which would satisfy the language of the contract. This subject-matter is not cut down or varied by the subsequent words "known as the 'White Hart,' with stabling and garden." These words, taken together with the preceding words, are satisfied by the subject-matter he did in fact occupy, viz. so much of the premises known as the "White Hart" as he did occupy with the stabling and garden. Thus, if we look to the mere terms of the agreement themselves, there is a subject-matter to which, by a reasonable construction, all the terms of the agreement are applicable. Then, if we are entitled to look to the extrinsic evidence, it seems to me clear that the coach-house was not to pass. Looking to the knowledge possessed by both parties, and what passed, both parties must be taken to have understood that they were dealing with what the plaintiff had power to pass. It was argued that it could not have been intended that the defendant should not ultimately have possession of the coach-house. But the result suggested does not follow from the construction which we put upon the contract. In point of fact, Samson's tenancy appears to have been ultimately determined, and occupation even of the coach-house was offered to the defendant in March, but he preferred to stand by a technical objection and refused what in any point of view was a substantial performance of the agreement even on his own interpretation of it. If the contract did not include the coach-house it was open to the defendant to make a subsequent arrangement with respect to it, and he might in fact have made one.

With respect to the second question, viz. whether the 100*l.* mentioned in the agreement is a penalty or liquidated damages, I am of opinion that it is the former. The question does not depend

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in such cases on the words used with respect to the damages themselves taken apart from the nature of the stipulations to be performed. The courts refuse to hold themselves bound by the mere use of the words "liquidated damages," and will look to what must be considered, in reason, to have been intended by the parties in relation to the subject-matter. If we look to the nature of the contract in the present case, it will be seen that it involves several events of various degrees of importance, and, therefore, according to the general principle governing such cases, the sum mentioned must be considered as a penalty and not liquidated damages. The rule must therefore be absolute to reduce the damages to 30*l.*

KEATING, J. I am of the same opinion. It is unnecessary for me to add anything to what has been said by my lord on the first question. With regard to the second question, I desire to add a few words as to what passed in this Court in the case of *Lea* v. *Whitaker.* (1) In that case reference was made to the case of *Reilly* v. *Jones* (2), and reliance has been placed on that decision in the present case. Now, it was pointed out by my lord during the argument that one of the grounds on which *Reilly* v. *Jones* (2) was decided was, that no case had been decided in which, when the parties had used the expression "liquidated damages," the Court had held that a penalty was intended, and that the subsequent decisions have not treated that consideration as conclusive. I no doubt referred to *Reilly* v. *Jones* (2), in the case of *Lea* v. *Whitaker* (1), without making the requisite qualification with respect to it; but the ground on which the remaining members of the Court proceeded, though they cited *Reilly* v. *Jones* (2), was that established by the subsequent cases. The facts of *Lea* v. *Whitaker* (1) pointed very strongly to the conclusion that the damages were liquidated, for there the sum of 40*l.* had actually been deposited in the hands of a stakeholder to be paid over to the party against whom a breach of the agreement should be committed, and the words were, "Either party failing, &c., shall forfeit to the other his deposit money as and for liquidated damages." The Court held the 40*l.* to be liquidated damages, not merely

(1) Law Rep. 8 C. P. 70.

(2) 1 Bing. 302.

because the words "liquidated damages" were used, but from the nature of the case with respect to the deposit of the money, it being difficult to see how the stakeholder could apportion the sum in accordance with the damage sustained from the breach of any particular stipulation. It seems to me, therefore, that the case of *Lea* v. *Whitaker* (1) was rightly decided.

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Denman, J. I am also of the same opinion, and with regard to the construction of the agreement I will add nothing. With respect to the admission of the parol evidence, I am clearly of opinion that it was admissible so far as was necessary to identify the subject-matter of the contract. With respect to the second point, I did entertain some doubt during the argument, and but for the case of *Davies* v. *Penton* (2), which was cited by Mr. Bray, I should have still doubted whether the true construction of the contract was not that the parties intended that the sum of 100*l.* was to be paid as liquidated damages in case of a total refusal to perform the agreement by either party. That case, however, seems to carry what is no doubt the principle of the decisions on this subject so far as to show that the words which I thought necessarily indicated an intention that the sum mentioned should be liquidated damages cannot be taken to do so. I am therefore of opinion, on consideration of the whole of the agreement, that notwithstanding those words, the sum of 100*l.* is merely mentioned as a penalty. With regard to the case of *Lea* v. *Whitaker* (1), I think it will be found that I based my judgment on the ground that there was a special agreement that the deposit was to be forfeited in the event of a breach of the contract.

Rule absolute.

Attorneys for plaintiff: *Cox & Sons.*
Attorney for defendant: *Murrough.*

(1) Law Rep. 8 C. P. 70.

(2) 6 B. & C. 216.

CARTER AND ANOTHER, PETITIONERS; MILLS, RESPONDENT.

EXETER ELECTION PETITION.

1874
Jan. 27.

Post 706
710, 5, 6

Election Petition—Dissolution of Parliament—Abatement of Petition—Return of Deposit.

The effect of a dissolution of Parliament while an election petition is pending, before the hearing of such petition, is that the petition drops, and the Court will order the sum deposited by the petitioner by way of security for costs to be returned to him.

THIS was a petition against the return of the respondent as a member of Parliament for the city of Exeter.

After the commencement of the petition, and before the day fixed for its hearing, a dissolution of Parliament had taken place. An application had been made to Baron Bramwell at Chambers for a return of the deposit made by the petitioners by way of security for costs under the Parliamentary Elections Act (31 & 32 Vict. c. 125), and Reg. Gen., Michaelmas Term, 1868, No. 16, on the ground that by the dissolution of Parliament the petition abated. The learned judge referred the matter to the Court for their opinion as to the effect of the dissolution upon the petition.

Chandos Leigh accordingly applied for a rule nisi for the return of the deposit to the petitioners. The Parliamentary Elections Act (31 & 32 Vict. c. 125) s. 35, provides for the withdrawal of a petition, and in such case the petitioner is liable to pay the respondent's costs. But this case is clearly not one of withdrawal. The Act does not provide for the case of a dissolution. It is contended that the petition simply drops by operation of law, and that being so, the petitioner is entitled to be paid out his deposit.

Petheram, who appeared for the respondent, consented to the application.

COLERIDGE, C.J. I am of opinion that this application should be granted. The Queen having been pleased to dissolve Parliament, of which fact the Court must take judicial cognizance, a case has arisen not expressly provided for in the Act; and under

But if petn had costs can be taxed & recovd.
Marshall v James, post 702

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these circumstances we must guide our proceedings by the old parliamentary practice on the subject. It is common knowledge, that according to the old practice the petition abated or dropped in such a case. We think the result is the same now, and that we therefore have authority, and ought to make an order for the return of the deposit.

Keating, J. I am of the same opinion. The effect of the dissolution, as it seems to me, is to cause the petition to drop. The only question is, then, as to what is to become of the deposit. I think the rules authorize us to allow it to be paid out again to the petitioner in such a case, and in the present case the respondent himself consents to that course being adopted.

Denman, J., concurred.

Rule absolute.

Attorneys for petitioners: *Wyatt & Hoskyns.*
Attorney for respondent: *Philbrick.*

Jan. 20.

MILLER *v.* DAVID.

Slander—Words not Actionable in themselves—Special Damage.

A statement false and malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably under some circumstances, and at the hands of some persons, suffer damage, will not, even though damage has resulted in fact, support an action for defamation.

A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "He was the ringleader of the nine hours system," and "He has ruined the town by bringing about the nine hours system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system at L.," whereby the plaintiff was prevented from obtaining employment in his trade at L. :—

Held, that, the words not being in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained.

The first count of the declaration stated that the plaintiff was, at and during the times of the committing by the defendant of the grievances in the several counts mentioned, a working stone-mason residing at Llanelly, in the county of Carmarthen, and sought and earned his livelihood by working as a stone-mason for wages as servant of builders and others employing masons in Llanelly or the neighbourhood of Llanelly, and was at the time of the committing of the grievances in that count mentioned so employed in certain works carried on under the management of a person surnamed Mayberry, and before the times of the committing of the grievances in the several counts mentioned three public meetings had been held at Llanelly aforesaid of divers masons, with the object of promoting the adoption in Llanelly aforesaid of a system of labour amongst masons employed there, called "the nine hours system," consisting in, amongst other matters, the diminution of the hours of labour per week theretofore established and in use for masons in Llanelly aforesaid; and the said nine hours system was at the said times considered by the defendant and Mayberry and divers employers of masons in Llanelly aforesaid as inexpedient and prejudicial to divers trades carried on in Llanelly aforesaid, and injurious to the public welfare of Llanelly; and at the said times persons known or suspected to be ringleaders or agitators of the movement in favour of the nine hours system were looked upon with disfavour and suspicion by such employers, who would not readily employ them; and such persons found their means of obtaining employment diminished,—all which the defendant at the said times well knew: Yet the defendant falsely and maliciously spoke and published of the plaintiff to Mayberry the words following, that is to say, "He" (meaning the plaintiff) "was the ringleader of the nine hours system;" whereby and by means of which premises the plaintiff was injured in his occupation of a stone-mason, and was discharged from his said employment at the said works, to wit, the Old Castle Iron and Tin Plate Works, and was without and could not obtain employment for a considerable time, and could get no employment but one of less value to the plaintiff, the place of employment being distant from his place of abode, and his necessary meals thereby becoming more costly, and such place of employment being exposed to wet weather.

Second count, for that the plaintiff repeats and re-affirms the said matters of inducement applicable to this count, and says that

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the defendant falsely and maliciously spoke and published of the plaintiff to one Rees Jenkins, an employer of stone-masons as aforesaid, the following words, that is to say, "He" (meaning the plaintiff) "has ruined the town by bringing about the nine hours system, and he" (meaning the plaintiff) "has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly;" whereby the plaintiff was injured in his occupation of a stone-mason, and the said Rees Jenkins refused to take him into his employment as a stone-mason, and the plaintiff was without and could not get employment, &c., as in the first count.

The fifth and sixth counts were similar to the first and second, but alleging the words to have been spoken in the Welsh language.

Demurrer, on the ground that the words were not in themselves defamatory, and that special damage consequent thereon, therefore, gave no action. Joinder in demurrer.

Nov. 20, 1873. *H. Giffard, Q.C.*, in support of the demurrer. The words alleged in the counts demurred to to have been spoken of the plaintiff, not being defamatory in their nature, are not actionable, even though followed by special damage. In *Lumby* v. *Allday* (1), where the declaration stated that the plaintiff was clerk to a gas company, and that the defendant spoke of him words imputing to him incontinence and consequent unfitness to hold his situation, Bayley, B., delivering the judgment of the Court, said: "The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not from their tenor import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk. The plaintiff relied on the rule laid down by De Grey, C.J., in *Onslow* v. *Horne* (2), 'that words are actionable when spoken of one in an office of profit, which may *probably*

(1) 1 C. & J. 301, 305.

(2) 3 Wils. at p. 186.

occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may *probably* tend to their damage.' The same case occurs in Sir W. Bla. 753, and there the rule is expressed to be, 'if the words be of *probable* ill consequence to a person in a trade or profession, or an office.' The objection to the rule as expressed in both reports appears to me to be, that the words 'probably' and 'probable' are too indefinite and loose; and, unless they are considered as equivalent to 'having a natural tendency to,' and are confined within the limits I have expressed in stating the defendant's objections, of shewing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant. Every authority which I have been able to find either shews the want of some general requisite, as, honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk." In *Kelly* v. *Partington* (1), the words were "She (meaning the plaintiff) secreted 1*s*. 6*d*. under the till, stating, these are not times to be robbed:" and it was held, on motion in arrest of judgment, that the words were not defamatory in their nature, and therefore not actionable, even though followed by special damage. Patteson, J., there says: "I have always understood that the special damage must be the natural result of the thing done. The words here are, 'The plaintiff secreted 1*s*. 6*d*. under the till, stating, these are not times to be robbed.' There is no innuendo stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But, if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory." So, in *Ayre* v. *Craven* (2), words imputing adultery to a physician, though alleged to have been spoken of him in

(1) 5 B. & Ad. 645.

(2) 2 Ad. & E. 2.

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his profession, were held not to be actionable without special damage.

In the recent case of *Foulger* v. *Newcomb* (1), the law is assumed to be as above stated. The judgment distinguishes that case from *Ayre* v. *Craven* (2) on the ground that there "the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession;" whereas in the case in hand it did. The only case which bears a contrary aspect is *Moore* v. *Meagher* (3), where it was held that, if, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action. Heath, J., there says: "Undoubtedly all words are actionable, if a special damage follows." That clearly could not be maintained at the present day.

Bray, contrà. The words are charged to have been spoken maliciously, they are in their nature defamatory, and they are alleged to have caused special damage to the plaintiff; consequently they are clearly actionable.

[DENMAN, J. *Cox* v. *Cooper* (4), cited in Day's Common Law Procedure Acts, 4th ed. p. 98, seems to be against you. It was there held that s. 61 of the Common Law Procedure Act, 1852, does not relieve the plaintiff from shewing in his declaration by proper innuendoes that words not in themselves actionable were used with a specific actionable meaning.]

"Any words by which a party has a special damage" are actionable: Com. Dig. *Action upon the Case for Defamation* (D. 30).

[LORD COLERIDGE, C.J. In Starkie on Slander, 3rd ed. p. 97, it is said: "In the early part of the reign of Queen Anne, Holt, C.J., observed that, whenever the words tended to take away a man's reputation, he would encourage actions for them; because so doing would much contribute to the preservation of the peace. (5) And Fortescue observed on this ruling in a subsequent case (6), that it was also Hale's and Twisden's rule; and he thought it a very good one."]

(1) Law Rep. 2 Ex. 327.

(2) 2 Ad. & E. 2.

(3) 1 Taunt. 39.

(4) 12 W. R. 75.

(5) *Baker* v. *Pierce*, 6 Mod. 23.

(6) *Button* v. *Heyward*, 8 Mod. 24.

In *Ayre* v. *Craven* (1) the action failed because the declaration did not shew how the words spoken were connected with the plaintiff's professional conduct. In *Kelly* v. *Partington* (2) Littledale, J., says that, to make defamatory words the subject of an action, they must be followed by special damage; and he goes on,—"In Com. Dig. *Action upon the Case for Defamation* (D. 30), it is said *generally* that any words are actionable by which the party has a special damage; but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporary punishment. In all the instances put, the words are injurious to the reputation of the person of whom they are spoken. I think we cannot say that the words here impute anything injurious to the plaintiff." The judgments of the other three judges proceed upon the ground that the special damage alleged was too remote. *Green* v. *Button* (3) is not distinguishable from the present case. There the defendant falsely and maliciously set up a claim of lien,* and thereby induced a third person not to deliver to the plaintiff certain goods which he had purchased and paid for; and it was held that the special damage alleged, viz. the non-delivery of the goods, was sufficiently connected with the wrongful act of the defendant to support the action. Then, the words are defamatory in themselves: they impute to the plaintiff a violation of his moral duty towards his employer.

[LORD COLERIDGE, C.J. The plaintiff is alleged to have done no more than that which Parliament has expressly sanctioned.]

That the words were spoken of the plaintiff in the way of his trade of a mason, is matter of law to be inferred from the circumstances.

[LORD COLERIDGE, C.J. That might and ought to have been averred, but it is not.]

Nobody can doubt that the word "ringleader" is one which is capable of being used in a defamatory and injurious sense: and whether or not it is so used is a question for a jury, not for the Court: *Jenner* v. *A'Beckett*. (4)

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(1) 2 Ad. & E. 2.

(2) 5 B. & Ad. 645, 650.

(3) 2 C. M. & R. 707.

(4) Law Rep. 7 Q. B. 11.

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[DENMAN, J. In that case there was an innuendo giving the words a defamatory sense.]

Lord Campbell, C., in the course of the argument in the House of Lords in *Lynch* v. *Knight* (1), says: "It must not be laid down as a universal rule that a man cannot maintain an action if he is induced by false representations to do an act which occasions him damage. The real question is, whether under the circumstances his conduct is reasonable, not simply whether it is wrongful." And Lord Wensleydale, in giving his judgment in the same case, says (2): "Upon this question I am much influenced by the able reasoning of Mr. Justice Christian. (3) I strongly incline to agree with him that, to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow. In *Vicars* v. *Wilcocks* (4), I must say that the rules laid down by Lord Ellenborough are too restricted. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words."

[BRETT, J. That view does not appear to have been assented to by the majority of the judges.]

Cur. adv. vult.

Jan. 20. The judgment of the Court (Lord Coleridge, C.J., and Keating, Brett, and Denman, JJ.,) was delivered by

LORD COLERIDGE, C.J. In this case time was taken to consider our judgment, from the wish entertained by at least one member of the Court to hold, if there were authority for the proposition, that a statement false and malicious made by one person in regard to another whereby that other might probably, under some circumstances, and at the hands of some persons, suffer damage, would, if the damage resulted in fact, support an action for defamation. No proposition less wide in its terms than this would support the present declaration; for to call a man "the ringleader of the nine-hours system," and to say of him that he "had ruined a place by bringing about that system," could not under many circumstances and at the hands of many people do the subject of such statements any damage at all. But we are unable to find any authority for a proposition so wide and general in its terms as would alone support this action.

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(1) 9 H. L. C. 577, at p. 583.
(2) 9 H. L. C. at p. 600.
(3) See 4 Irish Jur. (N.S.) 284.
(4) 8 East, 1.

8 Jur. N.S. 732

(1) S.C. 8 Jur. N.S. 724

The rule, as laid down by De Grey, C.J., in *Onslow* v. *Horne* (1), that words are actionable if they be of probable ill consequence to a person in a trade or profession or an office, is expressly disapproved of by the Court of Exchequer in *Lumby* v. *Allday*. (2) Bayley, B., there says: "Every authority which I have been able to find either shews the want of some general requisite, as, honesty, capacity, fidelity, or the like; or connects the imputation with the plaintiff's office, trade, or business." In that case, the words proved were a very strong imputation on the morality of the plaintiff, who was a clerk to a gas company. But the Court held them not actionable, because the imputation conveyed by them did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk. That case and the language of Bayley, B., in delivering the judgment of the Court, have since been repeatedly approved of, and are really decisive of this case.

The words before us are not actionable in themselves. No expression in them was argued to be so except the word "ringleader:" and, as to that, it is sufficient perhaps to say that Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import; for, amongst other authorities, he cites Barrow as calling St. Peter the "ringleader" of the Apostles. (3) Neither are the words connected with the trade or profession of the plaintiff, either by averment or by implication; so that, on neither ground can the declaration be supported.

(1) 3 Wils. at p. 186; 2 W. Bl. at p. 753.

(2) 1 C. & J. 305.

(3) "It may be reasonable to allow St. Peter a primary of order, such a one as the ringleader hath in a dance:" Barrow's Treatise of the Pope's Supremacy, Oxford ed. of Works, 1830, vol. vii. p. 70. In Fox's Preface to Tyndall's Works, "these three learned fathers of blessed memory, William Tyndall, John Frith, and Robert Barons," are styled "chief ringleaders in these latter tymes of thys Church of England."

There is no averment here that the consequence which followed was intended by the defendant as the result of his words; and therefore it is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action. The judgment of Lord Wensleydale in *Lynch* v. *Knight* (1) appears in favour of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it; and upon this demurrer there must be judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *Stretton.*
Attorneys for defendant: *Cowdell, Grundy, & Browne.*

Jan. 24.

WELLER *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company—Negligence—Invitation to alight—Overshooting Platform—Contributory Negligence.

10 Q.B. 273

On the approach of a train to a station, a porter called out the name of the station, and the train was brought to a standstill. Hearing carriage-doors opening and shutting, and seeing a person alight from the next carriage, the plaintiff (a season-ticket holder accustomed to stop there) stepped out of a carriage; but, the carriage in which he was having overshot the platform, he fell on to the embankment and was hurt. It was night, and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the driver intended to back the train:—

Held,—upon a reservation in which it was agreed that the Court should "be at liberty to draw inferences both as to negligence by the defendants and want of reasonable care of the plaintiff, and upon the facts generally,"—that there was evidence from which a jury might reasonably find negligence on the part of the company's servants, and no evidence of contributory negligence on the part of the plaintiff.

THE declaration stated that, at the time of the committing of the grievances thereinafter mentioned, the defendants were carriers of passengers for hire from London Bridge to Selhurst, in carriages on a railway, and used a certain station at Selhurst for the reception and accommodation of their passengers on alighting at that station; that the station was then in the possession and under the management of the defendants for the purposes aforesaid; yet that the defendants negligently managed the station and carriages, and placed and stopped the carriages on arriving at the station at inconvenient and dangerous places at the station, and kept the station in a dangerous state, and omitted to provide sufficient accommodation for the safely alighting of their passengers from the carriages there, and to light the station in proper places and in a sufficient manner for the use of their passengers during the hours of darkness, and neglected to give proper and sufficient warnings and directions to their passengers necessary for their safe alighting, and misled their passengers as to the safety of their alighting; whereby the plaintiff, having been received by the defendants for hire as, and being, a passenger to be carried by them from London Bridge to Selhurst aforesaid, on alighting from the carriage and train at the said station and platform, fell and was thrown down with great violence at the said station, and was greatly bruised, wounded, and injured, and had suffered and would suffer great pain of mind and body, and was unable for a long time to attend to his business of a wine and spirit merchant, and to earn profits therein, and incurred expense for surgical and medical attendance.

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(1) 9 H. L. C. at p. 600. 8 Jur NS 730

See Bridges v North London Ry Co LR 7 HL 213.

Plea, not guilty. Issue thereon.

The cause was tried before Bovill, C.J., at the sittings in Middlesex after last Trinity Term. The facts were as follows:—The plaintiff was a passenger by a train on the defendants' railway, from London Bridge to Selhurst, near Norwood, on the 25th of November, 1872. He was a season-ticket holder, and resided at a short distance from Selhurst station. On the arrival of the train at the station, between six and seven o'clock in the evening, a porter (the only one on duty) called out "Selhurst, Selhurst," and then the train stopped. The plaintiff, hearing the name of the station, and also hearing the opening and shutting of carriage doors, concluded that he had arrived at his destination, and opened the door of the carriage in which he had been riding, the second from the engine, and put one foot upon the step, and, not being

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aware that the train had overshot the platform (the nearest light being distant forty-nine feet), in attempting to leave the carriage, fell upon the embankment, a depth of about four feet and a half, and was injured. The plaintiff himself said it was so dark that he could not see whether there was a platform or not, but that, seeing another person get out of the next carriage, he thought all was right. There was no evidence to shew that the stoppage of the train was a temporary one only, or that the train was afterwards backed; but, on the contrary, it seemed to be clear that the train pursued its journey without having been backed. Another passenger, who went to the plaintiff's assistance, stated that he had alighted from another carriage (the third from the engine) before the plaintiff stepped out.

Upon this evidence, his Lordship ruled, that, upon the authorities, there was no evidence of negligence in the company's servants to go to the jury; and he directed a nonsuit, with leave to the plaintiff to move to enter a verdict for him for 100*l.* (agreed damages), the Court to be at liberty to draw inferences both as to negligence by the defendants and want of reasonable care of the plaintiff, and upon the facts generally: and his Lordship added, "The law upon this subject has undergone a great deal of consideration, and judges and juries do not agree upon it. It seems for some time to have been considered, that, when there was an accident, a man had nothing to do but to bring an action against the railway company and to recover. But times are altered: the railway companies are not considered insurers; and there are two things to be considered,—one is, whether there is negligence on the part of the company, and the next is, whether there has been want of care on the part of the plaintiff: and, generally speaking, if there is a station, and sufficient light to shew a platform, and the train stops there, a passenger is justified in getting out and stepping upon that platform. If there happens to be a space between the carriage and the platform, and the platform recedes, so that, though he has seen the platform, he cannot see the intermediate chasm, and steps into it, the company are responsible for this negligence, and there is no negligence on his part; but, if the passenger gets out at a place where, instead of there being a platform, and a light shewing that there is a platform, there is no

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platform, and it is so dark that he cannot see where he is going, then he is himself to blame for stepping out under such circumstances,—where he is a person, at all events, in the habit of travelling, as in this case. Therefore, the plaintiff, in my judgment, is not entitled to recover, if he does not bring his case within any of the exceptions in which it has been held he may recover." And he referred to *Bridges* v. *North London Ry. Co.* (1), and *Cockle* v. *London and South Eastern Ry. Co.* (2)

A rule nisi having accordingly been obtained,

Lopes, Q.C. (*Joyce* with him), shewed cause. The evidence disclosed no actionable negligence on the part of the company; and, at all events, there was negligence on the plaintiff's part which contributed to the accident. The mere calling out the name of the station has been held not to amount to what has been called an invitation to alight: *Bridges* v. *North London Ry. Co.* (1)

[HONYMAN, J. The porter having called out the name of the station, and the train having stopped, was not the plaintiff justified in assuming that he had reached his destination, and alighting from the carriage?]

The true question is, whether he ought not to have first ascertained that if he stepped out he would alight on the platform. In *Cockle* v. *South Eastern Ry. Co.* (2), the train had come to a final standstill; and in *Praeger* v. *Bristol and Exeter Ry. Co.* (3), the carriage-door was opened by the guard. Here, however, there was nothing to shew that the train had come to a final standstill; and the carriage-door was opened by the plaintiff himself. The most recent case upon this subject is *Lewis* v. *London, Chatham, and Dover Ry. Co.* (4) It was there held by the Court of Queen's Bench that the mere stopping of a train and calling out the name of a station is *no* evidence of an invitation to alight. The facts were these:—The plaintiff was a passenger by the defendants' railway to Bromley station. As the train approached Bromley, she heard "Bromley, Bromley," called out several times.

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(1) Law Rep. 6 Q. B. 377.

(2) Law Rep. 7 C. P. 321.

(3) 24 L. T. (N.S.) 105.

(4) Law Rep. 9 Q. B. 66.

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The train was brought to a standstill, but not before it had partly overshot the platform. The engine was then on the other side of a bridge adjoining the platform. As the plaintiff was in the act of getting out, and when her foot was on the step of the carriage, the train was put back with a jerk, and she fell on the platform. The period occupied by the stoppage was little more than momentary, and the plaintiff knew the station well. Upon these facts,—the Court not having power, as here, to draw inferences,—it was held that there was no evidence of negligence on the part of the defendants to go to the jury. In the course of the argument, Blackburn, J., observed: "This case is quite distinguishable from *Cockle's Case.* (1) As for the calling out the name of the station, that was but telling the plaintiff what she knew." And in giving judgment the same learned judge said: "The question is, whether there was evidence on which a jury could reasonably find that the defendants were guilty of negligence: and I am of opinion that there was no such evidence. . . . On reaching the station, the train overshot the platform,—a thing which may happen from all kinds of reasons, and does often happen. . . . I see nothing on the part of the company to induce the plaintiff to get out, when from the circumstances she had every reason to believe that she was not to get out unless she should be expressly requested to do so. I do not at all agree that 'Bromley, Bromley,' meant 'jump out.' The calling out the name of the station is generally done just as the train is drawing up, and before it has quite stopped; and this is a matter of common knowledge. It is, in fact, done by way of preparing passengers to get out." Quain, J., said: "The plaintiff had no ground for believing that the train had come to a standstill, for she knew the station well. There was no opening of the door by a porter, or other invitation for her to alight. She did of her own motion that which the company had done no act whatever to induce her to do." And Archibald, J., added: "There may be conduct on the part of a company's servant, without the opening of a door or requesting to alight, which amounts to an invitation to alight. For instance, if a train should stop for a considerable time, that might be an invitation. But here the train had gone considerably beyond the platform, and the plaintiff must have been aware of the danger of getting out, knowing the station, as she did."

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(1) Law Rep. 7 C. P. 321.

[BRETT, J. The foundation of the judgment there was, that the plaintiff must have known that the train was going to back. But here there was no evidence that the train was going to back. On the contrary, it appears to have gone on after the accident without having put back at all.

DENMAN, J. The name of the station was called out, the opening of doors was heard, the train had stopped, another passenger had got out before the plaintiff did so, and there was no warning, and no light near. Was not that *some* evidence of negligence on the part of the company?]

It is not enough to shew that there was negligence on the part of the servants of the company. The plaintiff cannot recover if his own want of ordinary care contributed in any degree to the injury of which he complains. It is material to bear in mind that he was well acquainted with the station. He was a season-ticket holder, and resided in the immediate neighbourhood. It was an act of extreme imprudence on his part to jump out of the carriage before he had the means of ascertaining whether it was alongside the platform or not.

Digby Seymour, Q.C., *Willis*, and *Milberry*, contrà, were not called upon.

BRETT, J. I am of opinion that this rule should be made absolute. The first question is, whether the learned judge was entitled to nonsuit the plaintiff. In order to support his claim for damages, the plaintiff was bound to give such evidence as that the jury might reasonably find, having regard to all the circumstances, that there had been negligence on the part of the defendants, and no contributory negligence on his own part. The question of negligence or no negligence must be considered with reference to the relative positions of the plaintiff and the defendants. There may be no negligence in driving at a reckless pace across Salisbury Plain: but to drive at the same rate through a crowded street in London would clearly be negligence, or something worse. In the present case, I take the result of the evidence to be this:—Whilst

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[illegible]

the train was coming into Selhurst station, the servants of the company called out the name of the place. The train then came to a stop. Mr. Lopes says it was only a momentary stop. I cannot agree with him. I think the fair result of all the evidence is that the train had come to a final stop. Doors were heard to open, and people got out. One of the witnesses stated that he got out, and afterwards saw the plaintiff get out and fall upon the embankment. The evidence seems to me to be very strong to shew that the stoppage was intended to be a final one. I agree that to call out the name of the station before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But, if the porter has called out the name of the station, and the engine-driver has overshot the station, and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events, the jury may from these facts infer negligence. If the name of the station has been called out, and the train has come to a standstill, no warning being given to the contrary, the jury may very properly say that a passenger is guilty of no want of reasonable care in getting out. He has a right to suppose that the train has reached the spot where it is intended that he shall get out. It was said that the plaintiff acted imprudently in stepping out in the dark, without first ascertaining that the platform was before him. But it seems to me that the jury might well say that, the name of the station having been announced and the train having stopped, the plaintiff might very reasonably assume that if the carriage had gone beyond the limits of the station he would have been told so. Some judges have assumed the right to import into these cases what is supposed to be matter of common knowledge, so as to overrule the finding of the jury. I thought all that had been brought to a final end by the opinions of the majority of the Court of Exchequer Chamber in *Cockle* v. *South Eastern Ry. Co.* (1) It is for the jury to say whether upon the evidence before them the company have been guilty of negligence, but not what are the ordinary habits of engine-drivers or of railway passengers. I think there was abundant evidence of negligence to go to the jury here. With regard to the case of *Lewis* v. *London, Chatham, and Dover Ry. Co.* (1), we should undoubtedly have felt ourselves bound by that decision if the facts had been the same as those of this case, because they were clearly distinguishable from *Cockle's Case.* (2) But all the judges there assume that the plaintiff knew the station well, and knew or ought to have known that the train had not come to a final standstill. The stoppage was but momentary, and the train was immediately put back. No such facts occurred here. It is reserved to us to draw inferences. That must be taken to mean all such inferences as a jury might reasonably draw from the facts proved. All we have to ask ourselves therefore is, whether there was reasonable evidence of negligence on the part of the servants of the company upon which the jury could act. I think there was, and that there was no contributory negligence on the part of the plaintiff. For these reasons, I think the nonsuit must be set aside and a verdict entered for the plaintiff for the damages agreed upon.

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(1) Law Rep. 7 C. P. 321.

DENMAN, J. I am of the same opinion. Upon the mere statement of the cause of action as alleged in the declaration, the question raised is one which was peculiarly for a jury to decide, viz. whether there was evidence upon which they could reasonably find a verdict for the plaintiff. After the discussion of the facts by Mr. Lopes, who makes the question whether or not the train had come to a final standstill before the plaintiff got out of the carriage the turning point, it is not necessary to go minutely into the other facts of the case. I entertain a clear opinion that there was ample evidence upon which the jury might reasonably find that the train had come to a final standstill. The plaintiff stated that he heard doors opening and shutting, and saw a person in the next carriage get out before he did. Then there was the evidence of a passenger that after he got out he saw the plaintiff alight. The spot where the plaintiff alighted was dark, there being no lamp nearer than about forty-nine feet. There was no evidence of any warning to the passengers not to get out, or of any intimation that the train

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(1) Law Rep. 9 Q. B. 66. (2) Law Rep. 7 C. P. 321.

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was going to back; but, on the contrary, it afterwards pursued its journey without putting back. Upon the whole, I think all this was evidence upon which the jury might well find that there had been negligence on the part of the company, and no absence of reasonable care on the part of the plaintiff. I agree with my Brother Brett that the reservation as to drawing inferences of fact does not mean that the Court is to all intents and purposes to stand in the place of a jury. It must mean something short of that. From the evidence appearing upon the notes of the judge who tried the cause, if I had to say whether the verdict should be for the plaintiff or for the defendant, I should have no hesitation in saying that I should decide in favour of the plaintiff. There being in my opinion abundant evidence of negligence on the part of the company, and no evidence of any contributory negligence on the part of the defendant, I think the rule to set aside the nonsuit must be made absolute.

1 Q.B. 273

HONYMAN, J. I also think the nonsuit was wrong; not that I think the calling out the name of the station would per se be any evidence of negligence; for I rather agree with my Brother Keating in *Cockle* v. *South Eastern Ry. Co.* (1), that it amounts to no more than an intimation to the passengers that the train is approaching the station. I also agree with my Brother Blackburn in *Lewis* v. *London, Chatham, and Dover Ry. Co.* (2), that merely overshooting the platform a little would not per se be any evidence of negligence. But, the train having overshot the platform, and the name of the station having been called out, the omission of the company's servants to caution the passengers not to alight until the train had been brought up at the proper place, was evidence of negligence. Speaking for myself, I should say it was not only evidence of negligence, but negligence itself. As to contributory negligence, I find no facts to shew any. With regard to the case of *Lewis* v. *London, Chatham, and Dover Ry. Co.* (2), all that the Court of Queen's Bench there decided was, that the plaintiff, under the peculiar circumstances of that case, was not warranted in assuming that the train had come to a final standstill, and consequently that there was no evidence on which a jury could

(1) Law Rep. 5 C. P. 468.

(2) Law Rep. 9 Q. B. 66.

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reasonably find that the accident was the result of negligence on the part of the company's servants. There are no circumstances here which are at all parallel with those of that case. The rule will, therefore, be made absolute to enter a verdict for the plaintiff for 100*l.*

Rule absolute.

Attorney for plaintiff: *H. Aird.*
Attorneys for defendants: *Baxter & Co.*

HORNE *v.* HOUGH AND OTHERS.

Jan. 21.

Practice—Interrogatories—Payment into Court.

Where the defendant's object is to pay money into court in satisfaction of the plaintiff's cause of action, he will be allowed to interrogate the plaintiff as to the particulars of the damage sustained by him.

THIS was an action on the charter of a ship called the *Adela* brought by the charterer against the shipowners for not loading a cargo of iron ore on a voyage from Bilbao to Hartlepool in accordance with the charterparty.

The only plea was payment into court of 15*l.*

The plaintiff had given particulars of damages, in which he claimed for various expenses incurred in respect of warehousing and otherwise in relation to the cargo at Bilbao, and also in respect of loss of profit on the cargo in England.

Application had been made by the defendants at Chambers to Martin, B., for leave to administer interrogatories, and refused. The defendants appealed from the decision of Martin, B., to the Court, and a rule nisi had been obtained to administer the interrogatories, which were as follows:—

1. When were you first informed that the *Adela* could not take on board the agreed cargo; and did you at any time, and when, take any, and what, measures to obtain another vessel to carry the agreed cargo; and did you offer any, and what, freight to any other, and what, vessel or vessels to carry the said cargo?

2. Was not one Mr. Levison jointly interested with you in the

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Adela's intended cargo; and did not the said Mr. Levison, acting on behalf of himself and you, charter the steamship *Loreley* to carry a cargo of iron ore from Bilbao to Hartlepool; was not this charter made out at your office in Fenchurch Street, in the name of Mr. Jaufret, who was at the time a clerk in Mr. Levison's office at Bilbao; and was it not made out after the breach of the *Adela's* charter; and what rate of freight was payable by the terms of the charter of the *Loreley?*

3. Was the cargo intended for the *Adela* shipped in any, and what, steamer or steamers, and when, and for what port?

4. Was not the cargo shipped in the *Loreley* of the same description as that intended for the *Adela?*

5. Were not orders given by you, or by Mr. Levison with your knowledge, to the *Loreley* to proceed to Mostyn; and were not the said orders given on account of a better market at Mostyn than at Hartlepool; and was not the difference of market of sufficient importance to induce you to agree to indemnify the owner of the *Loreley* against the consequences of deviation from the chartered voyage, and did you not so agree?

6. What price did you obtain for the *Loreley's* cargo at Mostyn?

7. Where, at Bilbao, was the cargo intended for the *Adela* stored or placed, and what did you do with the same when you found the *Adela* refused to ship it? How long was it allowed to remain at Bilbao, and why was it allowed to remain there?

8. Did you pay any, and what, warehousing charges in respect of the cargo intended for the *Adela* at Bilbao, and to whom, and what was the amount of such charges? What was the usual rate of charge per ton paid to the owner of the land for depositing iron ore in heaps near the loading-places at Bilbao?

9. Were any lighterage charges incurred in respect of the *Adela's* intended cargo, and if so, under what circumstances were they incurred, and from what place, and to what place, was the cargo lightered, and why was it so lightered, and what was the charge for lighterage?

10. Did not the market price for iron ore go up at Bilbao and at Hartlepool, or at either, and which, of those places, after the breach of the charterparty complained of?

11. Was the *Adela* chartered for the purpose of fulfilling contracts for the delivery of ore at Hartlepool already entered into by you, or by you and Levison, or was she chartered to carry ore to Hartlepool on speculation, or was the ore you intended to put on board her intended for any, and what, person or persons at Hartlepool, or how otherwise?

12. Did you sell or deliver the *Adela's* intended cargo to any, and what, person or persons, and when, and where, and what price did you obtain for the same?

13. Have you in your possession, custody, or power, or in the possession, custody, or power of any, and what, person or persons on your behalf, any letters, papers, books, documents, accounts, or vouchers relating to the loss and damage claimed by you in this cause, or to the expenses incurred at Bilbao as to the chartering or attempting to charter other vessels in the place of the *Adela*, or to the sale of the cargo intended for the *Adela*, or to any of the items mentioned in the several particulars of damage delivered in this action? Give a list of the same, and say whether you object to produce any and which of them.

McLachlan shewed cause. The question is whether the defendants are entitled to interrogate as to damages. The first six interrogatories are inadmissible because irrelevant, being framed on a mistaken view as to the measure of damages. The fact that the charterers were able to charter another ship is immaterial, and cannot go in reduction of the damages naturally consequent on the breach of the first charterparty, for the charterer is entitled to second profits on the second voyage: *Brandt* v. *Bowlby* (1); Sedgwick on Damages, 4th ed. p. 356.

[KEATING, J. Surely the defendants are entitled to shew, in reduction of damages, that in point of fact you did charter a vessel which took the cargo in question under such circumstances that you were a gainer, and not a loser?]

The other interrogatories are as to the expenses included in the particulars, matter which forms part of the plaintiff's case, not the defendants'. It is a strong measure to put the plaintiff to prove his particulars on oath before the trial. The attempt is to get materials to disprove the plaintiff's case at the trial by cross-examining him before the trial on interrogatories.

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(1) 2 B. & Ad. 932.

[DENMAN, J. Here there has been only payment into court pleaded, with a view to staying the action. Does not that make a difference between this case and the case where the claim is altogether denied ?]

G. Bruce supported the rule. The defendants' object is to get such information as will enable him to pay a sufficient amount into court. The particulars do not give him this information, for they only shew what is the outside amount which the plaintiff is seeking to obtain.

[*Wright* v. *Goodlake* (1) was cited.]

COLERIDGE, C.J. When the question in issue is simply as to the amount of damage suffered, and the defendant is desirous of paying money into court for the purpose of satisfying the plaintiff's claim and staying the action, the reason of the thing would seem to shew that he is entitled to such information as is here asked for. I am of opinion that the rule should be made absolute.

KEATING, DENMAN, and HONYMAN, JJ., concurred.

Rule absolute.

Attorneys for plaintiff: *Ashurst, Morris, & Co.*
Attorneys for defendants: *Johnson & Coote.*

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(1) 34 L. J. Ex. 82.

MANSELL AND ANOTHER *v.* CLEMENTS.

1874 *Jan.* 31.

House-Agent—Right to Commission on Sale of a Lease "through his Intervention."

The plaintiffs, house-agents, were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on the plaintiffs' books, and they gave a few cards to view.

One U., who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at the plaintiffs' office and obtained a card to view the premises in question, amongst others, the terms being written by the plaintiffs' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price asked (2200*l.*) too high, and he went away. U. had no further communication with the plaintiffs; but he subsequently renewed his negotiation with a friend of the defendant's, and ultimately became the purchaser of the lease for 1700*l.* :—

Held, that there was evidence for a jury that U. had become the purchaser of the premises "through the plaintiffs' intervention," and consequently that the plaintiffs were entitled to the stipulated commission.

At the trial the judge put the following question to U. :—"Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house ?" and, overruling an objection by the defendant's counsel, received his answer, which was, "I should think not :"—

Semble, that the answer was properly received.

THIS was an action for commission alleged to be due to the plaintiffs on the sale of a house at Beulah Hill, Norwood.

The cause was tried before Denman, J., at the sittings at Westminster after last Trinity Term. The facts were as follows:—The defendant, in March, 1873, called upon the plaintiffs, who are auctioneers, valuers, and house and estate-agents at Norwood, and told them that she held the house called Woodfield, at Beulah Hill, for an unexpired term of thirty-seven years, at the yearly rent of 120*l.*, and that she was desirous of disposing of it for a premium of 2200*l.*, the fixtures and outdoor effects to be taken at a valuation. On the 26th of that month the plaintiffs received from the defendant a letter, as follows:—

"Mrs. Clements wishes to have in writing the terms for selling her place, and also that such charges will be made only in case of its being bought by any person recommended by you, and a statement of what charge will be made by you if the place is disposed of without your intervention."

On the same day the plaintiffs replied as follows:—

"Madam,—Our terms for letting or selling are as follows,—5 per cent. on one year's rent; 2½ per cent. on the amount received as premium. If you let on lease without premium, an additional 2½ per cent. on the second year's rental. 5 per cent. on any sum obtained for fixtures or furniture, whether by valuation or otherwise. If disposed of without our intervention, a charge of one guinea will be made for the trouble, &c., we may have had, advertisements, &c.; but these will not be inserted without your directions."

The defendant thereupon, through a gentleman named Bowra, instructed the plaintiffs to place the house on their books for sale. The plaintiffs gave cards to view the premises, and, amongst others, one was given to a Mr. Upton, under the following circumstances:— On the 1st of July, Mr. Upton, who was looking out for a house in the neighbourhood, saw a board up announcing Woodfield for sale, and referring to Phillips, a stationer in Norwood. Upton knocked at the door, but, being informed by a servant that there was a wedding party in the house, he said he would call again. On leaving Woodfield, Upton went to the plaintiffs' office and inquired of a clerk there what houses were to be had in the neighbourhood. The clerk thereupon gave him cards to view five different houses, Woodfield being one of them; and on the back of the card relating to the last-mentioned house, the clerk wrote the particulars as follows:—"Lease and rent. Premium 2200*l.*; rent 120*l.*; term unexpired, thirty-seven years; and fixtures, &c., at a valuation." A few days afterwards Upton went again to Norwood, and was shewn over Woodfield by Mr. Bowra; and on leaving he verbally offered 1700*l.* premium for it, which offer Bowra promised to submit to the defendant. After some correspondence between Bowra and Upton, the negotiation was broken off; but it was after a time renewed, and Upton's offer was ultimately accepted, and the premises were conveyed to Upton at that price, the plaintiffs never having in any manner interfered or been consulted.

Mr. Upton, who was called as a witness, stated that, when he left Woodfield on the first occasion, he abandoned all notion of purchasing the property, thinking the price would exceed his limits; but that, when he learned what was asked for it, he determined to go there again.

He was then asked by the learned judge,—"Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house?" This question was objected to by the defendant's counsel: but the learned judge overruled the objection; and the witness answered, "I should think not."

Under the direction of the learned judge, a verdict was taken for the plaintiffs for 51*l.*, leave being reserved to the defendant to move to enter a nonsuit or a verdict for her, if the Court should be of opinion that the plaintiffs were not entitled to be paid commission, the purchaser not having been found through their intervention, or if they should think that the question put by the learned judge was inadmissible.

J. O. Griffits, in Michaelmas Term last obtained a rule nisi.

Edmund Thomas (*Huddleston, Q.C.*, with him,) shewed cause. The plaintiffs were entitled to the stipulated commission if the house was disposed of through their intervention; and there was abundant evidence that it was. The particulars were entered in their books, and they gave cards to view. This is all that is usually done by house-agents: *Cunard* v. *Van Oppen*. (1) But for the plaintiffs' intervention by giving Upton the card containing the particulars and price, it is clear that that gentleman would not have entertained the notion of purchasing the premises. At all events, there was evidence to go to the jury, without the question which was objected to: and *Hardwick* v. *Coleman* (2) is an authority to shew that that question was properly allowed.

A. Lawrence (*J. O. Griffits* with him), in support of the rule. To found a claim for commission, the plaintiffs were bound to shew that they had done something without which the premises would not have been sold to Upton. All they proved was, that they entered the particulars of the defendant's house in their books, and that they gave three or four cards to view,—one to the person who ultimately, but without any further interference of theirs, became the purchaser, and that at a price considerably below the

(1) 1 F. & F. 716.

(2) 1 F. & F. 531.

sum mentioned by them. Upton, the purchaser, had had his attention called to the defendant's house, though he had not gone over it, before he got the card from the plaintiffs' clerk. And the negotiation had gone off in the first instance, Upton's offer having been considered by the defendant to be too low. Even with the answer given by Upton to the question which was objected to, there was no evidence to go to the jury of any substantial act done by the plaintiffs in furtherance of the sale. And the question itself was clearly not admissible: the impression on the mind of Upton could have nothing to do with the question whether or not the plaintiffs had earned commission. It was immaterial and irrelevant.

[KEATING, J. How otherwise could it be ascertained whether any acts of the plaintiffs conduced to the completion of the transaction?]

The witness might as well have been asked his opinion as to whether the plaintiffs or the defendant were entitled to the verdict. A question very similar was held to be inadmissible in *Bonfield* v. *Smith*. (1) At all events, it was asking the witness's motives, which would be equally inadmissible.

[KEATING, J. The question is whether the learned judge could, even without that piece of evidence, have nonsuited the plaintiffs.]

It is submitted that he could and ought to have done so. There can be no doubt the answer given by the witness very much influenced the minds of the jury.

KEATING, J. I think Mr. Lawrence was quite justified in arguing this case as he has done. It certainly runs very close to the line. If a judge nonsuits a plaintiff, and there was any evidence at all to go to the jury, the nonsuit must be set aside. If, therefore, my Brother Denman had nonsuited the plaintiffs in this case, I think he would have done wrong, inasmuch as there was some evidence for the jury. Upton, who became the purchaser of Woodfield, in passing saw a board up, announcing that the premises were for sale, but not referring to the plaintiffs. He went to the house, but could not then look over it. He went away under an impression that it was too large. On his way to the railway station, he called at the plaintiffs' office to inquire about houses. He there received four cards, one of which was to view the house in question, stating the premium and other particulars. He therefore received from the plaintiffs information which he had not acquired before. That led him to go again to the house; it was not suggested that there was anything else to induce him to go there. Having inspected the premises, a negotiation was commenced for the purchase of them between a friend of the defendant's and himself, which was afterwards broken off, and then renewed. In ninety-nine cases out of a hundred, the services performed by the house-agent upon these occasions is of the slightest possible kind: it consists for the most part in merely bringing the vendor and the purchaser together, so as to result in a sale. It is often done by a line written or a word spoken. Mr. Lawrence very properly admitted that, if the first information Mr. Upton got was that which induced him to buy the house, the plaintiffs would be entitled to their commission. It is true that a short interval of time elapsed between the intervention of the plaintiffs and the completion of the purchase. Independently of the question put by my Brother Denman, there were facts which he could not have withdrawn from the jury, and upon which they might properly find a verdict for the plaintiffs. The question is one which is very frequently put. If it was mere matter of opinion, it clearly would not have been admissible. But it was a fact which it would be difficult to say ought upon principle to have been excluded. It went to the jury, and no doubt produced its effect. According to the terms of the reservation, if there was any other evidence which could properly be left to them, that was not to be taken advantage of. As I am of opinion that there was such evidence, the propriety of the question need not be discussed. It is somewhat inter apices.

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(1) 12 M. & W. 405.

DENMAN, J. The discussion which this case has undergone confirms me in the opinion that the question was admissible. Its admissibility depends upon whether it was or was not relevant to the inquiry: and that depends upon what was the contract between the parties. Now, the contract is to be gathered from the two letters of the 26th of March. The defendant inquires what will be the plaintiffs' charge in case of the premises being bought by

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any person recommended by them, and what if disposed of without their intervention; and the plaintiffs write in reply, "our terms for letting and selling are so and so; if sold without our intervention, a charge will be made of one guinea for our trouble." It is contended that the sale took place without the intervention of the plaintiffs. I understand intervention to be something to be made out of facts which are for the jury and not for the Court. One material question was whether the buyer was influenced in making the purchase by any act done by the agents. The question I put was, "Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house?" To this Mr. Upton, judging of the state of his own mind, answered that it was in consequence of his going to the plaintiffs' office on the 1st of July that he ultimately became the purchaser of the house. I think the question was admissible: and I do not entertain a doubt that the jury were warranted in finding for the plaintiffs. Even if the answer ought to have been struck out, there was still evidence upon which the jury might reasonably find as they did. The house was put upon the plaintiffs' books with the particulars and terms of sale; and they gave several cards to view. On the 1st of July, the plaintiffs' clerk gave a card to Upton, stating the terms which the defendant was willing to accept. On the 7th, that gentleman viewed the premises, and ultimately he agreed with Mr. Bowra to become the purchaser, though for a smaller sum. I think the question was admissible, and that even without the answer there was abundant evidence to sustain the verdict.

HONYMAN, J. I have not heard the whole of the argument. But, from what I have heard, I feel satisfied that there was abundant evidence for the jury, quite independently of the answer given to the question put by my Brother Denman.

Rule discharged.

Attorneys for plaintiffs: *Harris & Finch.*
Attorneys for defendant: *Withall & Compton.*

SMITH AND ANOTHER *v.* EGGINGTON.

1874
Feb. 5.

Landlord and Tenant—Recognition by Mortgagee of Tenancy created by Mortgagor—Sale by Mortgagee under Power—Covenants or Stipulations running with the Reversion—Stat. 32 *Hen.* 8, *c.* 34*—Damages.*

On the 30th of June, 1872, one Bridgett, by an instrument not under seal, demised to the plaintiffs standings for three lace-machines in a room in a factory in Nottingham, the tenancy to commence on the 24th of June, the rent to be payable quarterly, the lessor to provide steam-power and to pay all rates and taxes, and the tenancy to be determinable by either party on six months' notice to expire at Midsummer. At the time of making this demise the premises were under mortgage to a building society. Interest being in arrear, the mortgagees on the 24th of August gave notice to the plaintiffs not to pay any more rent to Bridgett, the mortgagor; and early in September, pursuant to the power contained in the indenture of mortgage, the mortgagees contracted to sell the premises to the defendant, possession to be given on the 25th of December. The conveyance, however, was not executed until the 14th of February, 1873. On the 28th of September, 1872, the mortgagees (protesting that the plaintiffs were not entitled to notice) gave them notice to give up their standings at Christmas, and in November, 1872, and February, 1873, they received from them the quarters' rent due respectively at Michaelmas and Christmas. In the meantime some conversations took place between the plaintiffs and the defendant as to the former continuing in the factory upon altered terms; but no terms were ever agreed to, and no rent was received by the defendant. On the 24th of March, 1873, the defendant demanded possession of the portion of the factory occupied by the plaintiffs; on the 15th of May he cut off the supply of steam-power; and on the 22nd the plaintiffs brought their action:—

Held, that the defendant was not bound by the contract between Bridgett and the plaintiffs, it not being under seal, and therefore not within the stat. 32 Hen. 8, c. 34, and consequently, in the absence of adoption by him or of some new contract of tenancy between him and the plaintiffs, not liable in this action.

Semble, that the plaintiffs, if entitled to a verdict, would only have been entitled to damages for being deprived of steam-power from the 15th to the 22nd of May.

Semble, that the receipt of rent by the mortgagees from the plaintiffs was as against them a recognition of a subsisting tenancy under the agreement with Bridgett.

THE first count of the declaration stated that the plaintiffs became and were tenants to the defendant of a certain portion of a lace-factory of the defendant, at the yearly rent of 55*l.* 18*s.*, payable quarterly, on the terms amongst others that the defendant should provide sufficient steam-power to work and drive three machines of the plaintiffs erected on the said portion during twenty hours per day during the tenancy, the said tenancy to continue until the same should have been determined by six calendar months' previous notice to be given by either party; and that all things were done and happened, &c., to entitle the plaintiffs to have the said terms observed by the defendant, and to maintain this action in respect of the breaches thereinafter mentioned: Yet the defendant, during the tenancy, and without any such notice as aforesaid having been given, discontinued the supply of the said steam-power and wholly refused any longer to supply the same; whereby the machines of the plaintiffs were brought to a standstill, and the plaintiffs were compelled to discontinue their business and remove the said machines, and to dismiss their workpeople, at a great expense, and lost the profits they would otherwise have made by their said trade and the working of the said machines, and were compelled to rescind the contracts they had previously entered into, and were put to great expense in and about the removal of the said machines.

The second count stated that, in consideration that the plaintiffs would become and continue tenants to the defendant until the tenancy should have been determined by six calendar months' notice, to be given by either party, of a certain portion of a certain factory of the defendants, and would remove certain machines of the plaintiffs and set them up in the factory of the defendant, the defendant promised the plaintiffs that he would during the said tenancy supply sufficient steam-power, &c., &c.

The third count stated that a certain person being possessed of a lace-factory and premises, had agreed to allow the use of a certain portion of the same to the plaintiffs at the yearly rent of 55*l.* 18*s.*, payable quarterly, on the terms amongst others that the defendant should provide sufficient steam-power to work and drive three lace-machines of the plaintiffs to be set up and erected by the plaintiffs in the said portion during twenty hours per day during the continuance of the said arrangement, which was to continue until the same should be determined by six calendar months' previous notice to be given by either party; that afterwards, and before the plaintiffs had set up or erected the said lace-machines in the said portion, a contract was entered into by and between the owners of the said factory and the defendant for the sale by the said owners to the defendant of the said lace-factory and premises, including the said portion, whereof the plaintiffs had notice; that thereupon, in consideration that the plaintiffs would set up and erect the said lace-machines in the said portion of the said factory, the defendant promised the plaintiffs, when his said purchase should have been completed, to continue the said arrangement as if the defendant had been the original contracting party, and to continue to provide sufficient steam-power to work and drive the said machines during twenty hours per day until the said arrangement should have been determined as aforesaid, according to the terms agreed on as aforesaid; that, although the plaintiffs accordingly set up and erected the said lace-machines in the said portion of the said factory, and the said purchase was completed, and all things were done and happened, &c., and although the said arrangement was not determined as aforesaid; yet the defendant made default in supplying the said steam-power according to the said terms, and wholly refused so to do, whereby the plaintiffs had suffered the special damage in the first count mentioned.

Pleas, 1. As to the first count, that the plaintiffs did not become and were not tenants to the defendant of the premises upon the terms alleged; 2. As to the first count, that the defendant did not discontinue the supply of the said steam-power or wholly refuse to supply the same, as alleged; 3. As to the second and third counts, that the defendant did not promise, as alleged; 4. As to the second count, that the defendant did during the tenancy supply the said steam-power; 5. As to the third count, that the said person had not agreed to allow the use of the said premises to the plaintiffs on the terms alleged; 6. As to the third count, that the said purchase was not completed, as alleged; 7. As to the third count, that the defendant did not make default in supplying the said steam-power, nor did he refuse to do so, as alleged. Issue thereon.

The cause was tried before Honyman, J., at the last Summer Assizes at Nottingham. The plaintiffs and the defendant are lace-manufacturers at Nottingham. It is a common practice at Nottingham for lace-makers to hire windows or "standings" in factories for their machines, the space occupied by the machines of each lace-maker being divided from the rest of the room by a wooden partition, in some cases up to the ceiling, in others not;

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the owner of the factory supplying steam-power for driving the machines.

The plaintiffs on the 30th of June, 1872, became tenants to one George Bridgett, a factory owner, of three windows or standings in his factory in Woolpack Lane, Nottingham. The agreement of demise, which was not under seal, was as follows:—

"The lessor agrees to let and the lessees agree to take three windows in room No. 3 in the lessor's factory in Woolpack Lane, Nottingham, the lessor to provide steam-power for the said room, at the yearly rental of 55*l.* and 18*s.*, commencing on June 24th, 1872, and to continue at that rate; the lessor to provide steam-power during twenty hours per day, excepting the holidays hereinafter mentioned; but no charge for loss or stoppage shall be allowed as a claim in case of accident to engine, boiler, or gearing. The lessor is impowered at all reasonable times to have access to the room to oil the shafting and gearing and inspect the condition thereof. The holidays shall be the usual factory holidays, viz. two days at Easter, three days at Whitsuntide, two half days at the Summer races, three days at the October fair, and three days at Christmas, and any other holiday made by royal proclamation. The lessor to pay all rates and taxes. The tenancy to be determined by either party on six months' previous notice from the lessor, and on six months' from the lessees, terminating same time of year the tenancy commences, upon which of the usual quarterly days the said rent is to be made payable by four equal quarterly payments. But, in the event of the said lessees becoming bankrupt or insolvent, or in case the lessor should be compelled to distrain for non-payment of rent, the lessor shall be at liberty, but not compelled, to determine the said tenancy and this agreement by giving the lessees or one of them, or leaving on the premises in their tenancy, a notice in writing to quit the same in one week's time from the date of such notice, at the expiration of which time the said tenancy shall cease and this agreement is absolutely to determine; and in case of such notice or of a distrain not only for the rent due up to the last preceding quarter-day, but also for the proportion of the then current quarter down to the day of distraining for the same, as witness," &c.

The plaintiffs got some of their machines into the factory. Early in August Bridgett filed a petition for liquidation in the county court of Nottingham; and on the 24th of that month the plaintiffs received a notice from the solicitors of the Nottingham Permanent Benefit Building Society, informing them that Bridgett's interest in the factory was, by an indenture dated the 6th of April, 1871, mortgaged to the trustees of that society for securing the re-payment of a certain sum and interest, and that the subscriptions due according to the terms of the mortgage-deed were then in arrear, and requiring the plaintiffs to pay the rent then due and thereafter to become due in respect of the standings they then occupied to Mr. Thornton, their receiver.

Early in September, 1872, the mortgagees, in pursuance of the power of sale contained in the indenture of the 6th of April, 1871, put up the factory for sale by public auction. It was not then sold; but about a week afterwards the defendant became the purchaser of it by private contract, which was to be completed on the 25th of December, 1872. The conveyance, however, was not executed until the 14th of February, 1873. At the time of making this contract the defendant was aware that the factory was in the occupation of various tenants. On the 28th of September, 1872, the following notice to quit was sent by the solicitors of the mortgagees to the plaintiffs:—

"Messrs. Smith & Sons,—We do hereby give you notice to quit and deliver up to us, our heirs or assigns, on the 25th day of December next, or at such other time as your tenancy shall expire next after the end of three calendar months from the date of this notice, the quiet and peaceable possession of all those standings for machines in room No. 3, and all other hereditaments and premises whatsoever.

"This notice is given to you as an act of courtesy, but without admitting your right to notice from the mortgagees."

On the 6th of November, 1872, the receiver of the mortgagees received from the plaintiffs 6*l.* 19*s.* 9*d.*, the quarter's rent for the standings under their agreement with Bridgett, due at Michaelmas, 1872,—one half of that quarter's rent having been remitted by agreement with Bridgett: and on the 4th of February, 1873, the plaintiffs paid to the receiver of the mortgagees 13*l.* 19*s.* 6*d.*, being a quarter's rent of the standings due at Christmas-day.

Early in November, one of the plaintiffs met the defendant in Nottingham, when the latter told him that he had purchased the factory, but that he did not wish to disturb them in their standings, but should require them to sign a different form of agreement. An agreement was afterwards tendered to the plaintiffs for execution; but, acting under the advice of their solicitor, they refused to sign it. About the end of February, 1873, the defendant intimated to the plaintiffs that he should have to charge them more rent for their standings, in consequence of the advanced price of coal: to this the plaintiffs assented; but, on the 4th of March, 1873, they received from the defendant's attorney the following notice:—

"Gentlemen,—I am desired by my client Mr. H. Eggington to inform you that he requires immediate possession of the part of the room you now occupy in his factory situate in Woolpack Lane, under an agreement alleged by you to have been made with Mr. Bridgett.

"My client has no desire to put you to the slightest inconvenience: but, unless you at once make some arrangement satisfactory to him, you will be treated as trespassers, and proceedings will be taken against you forthwith.

"The alleged agreement, if made, was entered into with Bridgett after he had mortgaged, and when he really had no right to let, and my client has not acknowledged it; nor did his predecessors in title, the mortgagees, concur therein."

The plaintiffs persisting in their refusal to sign the agreement proposed by the defendant, the latter on the 15th of May demanded immediate possession of the room held by them, and, in order to enforce compliance with that demand, cut off the supply of steam-power. No rent had been received by the defendant. This action was brought on the 22nd of May, and the power was restored on the 26th.

On the part of the plaintiffs it was contended, that the Nottingham Permanent Benefit Building Society, having by the receipt of rent acknowledged the plaintiffs' tenancy under the agreement with Bridgett, were bound to supply steam-power until that agreement was duly put an end to by a proper notice to quit; that the defendant, having come in under the mortgagees, with knowledge that the factory was in the occupation of tenants, was also bound by the terms of the agreement under which those tenants held; and that, if not, he had entered into a fresh contract to supply steam-power until the 24th of June, 1873, and consequently was responsible to the plaintiffs for all the damages which they had sustained from its having been cut off. It was also contended that the plaintiffs, if not tenants, were licensees, and entitled to a reasonable time for the removal of their machines after the withdrawal of the licence.

For the defendant it was insisted that, whatever remedy the plaintiffs might have against Bridgett or against the mortgagees under the agreement with Bridgett, the defendant was not bound by that agreement, it not being under seal; that there was no evidence of any new agreement between the plaintiffs and the defendant whereby the latter accepted the former as his tenants, and consequently that as against him the plaintiffs were mere trespassers; and that, at the most, if entitled to recover at all, the plaintiffs could only be entitled to recover in this action in respect of the discontinuance of the supply of steam-power from the 15th of May, 1873, until the 22nd of that month, on which day the writ was issued.

The learned judge told the jury that, the agreement between Bridgett and the plaintiffs having been entered into after the date of the mortgage, the mortgagees were entitled to turn the plaintiffs out at any time, unless they had entered into some binding engagement with them that they should become their tenants; that the mere notice not to pay any more rent to Bridgett did not make the plaintiffs tenants to the mortgagees; that the receipt of rent by the mortgagees in November, 1872, and February, 1873, might possibly have created a tenancy as between the mortgagees and the plaintiffs; but that the defendant was not bound by or responsible for the acts of the mortgagees, and, in the absence of a fresh agreement between him and the plaintiffs, was under no obligation to supply them with steam-power, and consequently not liable in this action. And he left it to them to say whether there was such new agreement entered into, and what damages the plaintiffs had sustained from the discontinuance of the steam-power from the 15th of May, 1873, until the commencement of the action.

The jury found that there had been no fresh agreement between the defendant and the plaintiffs, and accordingly returned a verdict for the defendant,—assessing the damages contingently at 15*l.*

Digby Seymour, Q.C., in Michaelmas Term last, pursuant to leave reserved to him at the trial, obtained a rule calling upon the defendant to shew cause why a verdict should not be entered for the plaintiffs, on the ground that there was evidence upon which the judge ought to have directed the jury to find that the defendant was bound by the terms of the original tenancy, independently of any new or express contract between the parties; or why there should not be a new trial, on the ground of misdirection,—first, in leaving to the jury as the question in the cause whether there was a new and binding agreement between the defendant and the plaintiffs for the continuance of the supply of steam-power,—secondly, in directing the jury to restrict the damages to the date of issuing the writ,—thirdly, in not directing the jury that at all events the plaintiffs became licensees, and ought to have had notice and reasonable time afterwards to remove their machinery; or for a new trial on the ground that the verdict was against the weight of evidence.

Field, Q.C., and *Sills*, shewed cause. If this action had been brought against Bridgett, there would have been no defence; and possibly the mortgagees by receiving rent might have created a tenancy as between themselves and the plaintiffs. But the defendant is clearly not bound by the agreement with Bridgett, or by the acts of the mortgagees. The notice from the mortgagees not to pay rent to Bridgett did not create a tenancy even as between them and the plaintiffs: see the notes to *Moss* v. *Gallimore* (1), in 1 Sm. L. C. 6th ed. 569, 570: and the notice to quit did not carry the case of the plaintiffs any further. The ordinary implication from the receipt of rent does not arise here. The money was received, not as rent, but as a compensation for the actual occupation of the premises until Christmas, 1872. At all events, no tenancy was created beyond that day. But, assuming that a new contract of tenancy as between the mortgagees and the plaintiffs was created by the subsequent receipt of rent, so as to bind them by the terms of Bridgett's agreement, that contract did not pass by the conveyance to the defendant. The agreement to supply steam-power was a mere collateral agreement, not passing with or annexed to the reversion. In the notes to *Spencer's Case* (1), in 2 Smith's L. C., 6th ed. 51, the law is thus laid down:—"A covenant is said to run with land when either the liability to perform it or the right to take advantage of it passes to the assignee of that land. A covenant is said to run with the reversion when either the liability to perform it or the right to take advantage of it passes to the assignee of that reversion." "An opinion has sometimes been intimated that there were, even at common law, some covenants which ran with the reversion. The authorities, however, seem to preponderate in favour of the doctrine of Serjt. Williams, who, in *Thursby* v. *Plant* (2), says that 'the better opinion seems to be that the assignee of the reversion could not bring an action of covenant at common law.' And the cases will be best reconciled, and the whole subject rendered far more intelligible, if we adopt the view taken by the learned and eminent personages who have since edited that work, Vol. 1, 240*a*, note (*o*), viz. 'that, *at common law, covenants ran with the land, but not with the reversion*. Therefore, the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessee was not.' (3) Such being the state of the common law, stat. 32 Hen. 8, c. 34, after reciting among other things 'that by the common law no stranger to any covenant could take advantage thereof, but only such as were parties or privies thereunto,' proceeded to enact, &c." "Sect. 2 enacted 'that all lessees and grantees of lands or other hereditaments for terms of years, life, or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the King or of any other persons of the reversion of the said lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their

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(1) 1 Doug. 279.

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(1) 5 Co. Rep. 16 a.

(2) 1 Wms. Saund. 240, n. (3).

(3) See *Butler* v. *Archer*, 12 Ir. C. L. 104.

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leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors.' Leases not under seal are not within the meaning of this statute: *Brydges* v. *Lewis* (1); *Standen* v. *Chrismas.* (2) And the remedy upon the stipulations contained in them is by action in the name of the original stipulator: *Bickford* v. *Parson.*" (3) The rule there laid down has never been shaken or varied.

Digby Seymour, Q.C., and *Beasley*, in support of the rule. The defendant purchased the factory with notice of the agreement between the plaintiffs and Bridgett. There was abundant evidence from which the jury might and ought to have inferred that there was an adoption of the terms of that contract both by the mortgagees and by the defendant. It was put to the jury whether there was a new contract; but the contention on the part of the plaintiffs was, that there was evidence of an adoption of the old one.

[HONYMAN, J. I left it to the jury to say whether there was a new contract of tenancy upon the terms of the old agreement. I could only leave it to them. I could not direct them to find for the plaintiffs on that question.]

The continuing to supply steam-power down to the 15th of May was strong evidence for the jury of a tenancy by estoppel: *Buckworth* v. *Simpson.* (4) At all events, the conduct of the defendant amounted to a licence, so as to entitle the plaintiffs to a reasonable time after the determination of the will (if no tenancy existed) to remove their machines: *Cornish* v. *Stubbs.* (5)

KEATING, J. This was an action brought against the defendant upon an alleged contract between him and the plaintiffs for the supply of steam-power to certain lace-machines of the plaintiffs in his factory. It appeared that in June, 1872, one Bridgett, by an agreement not under seal, demised to the plaintiffs three windows or standings in his factory in Nottingham, and undertook to supply the necessary steam-power for working them, at one entire yearly rent, the tenancy being from year to year, determinable in the usual way by six months' notice. At the time that Bridgett made that agreement, he had mortgaged the factory to the trustees of the Nottingham Permanent Benefit Building Society, who as mortgagees were not bound by it. After the date of the demise, interest being due to them, the mortgagees intervened, and gave notice to the tenants to pay the rent then due and thereafter to become due to their receiver; and, early in September, 1872, the trustees of the building society, in pursuance of the power contained in their mortgage-deed, contracted to sell the factory to the defendant, and to give him possession on the 25th of December. On the 28th of September the mortgagees gave the plaintiffs a notice to quit "on the 25th day of December next, or at such other time as your tenancy shall expire next after the end of three calendar months from the date of this notice." The mortgagees also received from the plaintiffs on the 6th of November, 1872, the quarter's rent due under Bridgett's agreement at Michaelmas, 1872; and on the 4th of February, 1873, they received the quarter's rent due at Christmas. It is true that the notice to quit was accompanied by the following intimation,—"This notice is given to you as an act of courtesy, but without admitting your right to notice from the mortgagees." Some discussion took place as to whether the giving of this notice and the subsequent receipt of the rent, had the effect of a recognition of an existing tenancy as between the mortgagees and the plaintiffs. If it had been material to consider that question, I should have been inclined to think there was strong evidence, notwithstanding the memorandum at the foot of the notice, of a recognition of a tenancy by the mortgagees. But it is unnecessary to consider that question. The conveyance by the trustees of the building society to the defendant was executed on the 14th of February, 1873, and, unless there has been some contract by the defendant to supply the plaintiffs with steam-power, they cannot charge him in this action. Now, it was sought to charge him in one of two ways. In the first place, it was said that the agreement between Bridgett and the plaintiffs was recognized by the mortgagees, and that the covenants or engagements in it passed with the reversion to the defendant. My Brother Honyman, however, was of opinion that that was not so. To give effect to that argument, recourse must be had to the 32 Hen. 8, c. 34. But that statute has been held to apply only to contracts under seal; and the agreement in question was not under seal. But then it was said, and truly said, that, though not liable as reversioner, still the defendant might have rendered himself liable to the engagements contained in the agreement of June, 1872, by recognizing and adopting them so as to create a new contract between himself and the plaintiffs upon those terms. If he has done so, he would be undoubtedly bound thereby. Now, there was evidence that, after the defendant had entered into the contract with the mortgagees for the purchase of the factory, he negotiated with the plaintiffs with reference to a future tenancy, and that it was fully recognized by both parties that the tenancy was not to be continued upon the old terms. The negotiation proceeded upon that footing, and an agreement was drawn up by the defendant's attorney, but was not signed by the plaintiffs, because they objected to some of its terms. My Brother Honyman left it to the jury to say whether there was any contract which bound the defendant to the terms of the original tenancy, or whether there was any new agreement entered into by him to supply the plaintiffs with steam-power. The jury found distinctly that there was no such contract. That put an end to the case.

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(1) 3 Q. B. 603.

(2) 10 Q. B. 135; 16 L. J. (Q.B.) 265.

(3) 5 C. B. 920; 17 L. J. (C.P.) 192.

(4) 1 C. M. & R. 834.

(5) Law Rep. 5 C. P. 334.

Leave was reserved to the plaintiffs to move to enter a verdict for them if the Court should be opinion that there was evidence upon which the judge ought to have directed the jury to find that the defendant was bound by the terms of the original tenancy, independently of any new agreement between the parties. The defendant, however, clearly could not be bound by the terms of the original agreement, and there is therefore no ground for entering a verdict for the plaintiffs. Then, it is said that there was a misdirection. It was contended that the learned judge should have left it to the jury to say whether there had been any adoption by the defendant of the original contract for the supply of steam-power. In substance it was left to the jury to say whether there was a recognition or adoption by the defendant of the original contract or a substitution of a new one. Further, it is said that there was misdirection, or non-direction, in omitting to tell the jury that the plaintiffs became licensees, and ought to have had notice and reasonable time afterwards to remove their machinery. But no point seems to have been made of that at the trial. In truth there was no evidence to go to the jury of any such licence. It was a contract or nothing. The jury negatived the existence of a contract. It is unnecessary to consider the question as to the damages. The verdict was clearly right. The learned judge was not dissatisfied; indeed he reports that he would have been dissatisfied if the verdict had been the other way. I think the rule should be discharged.

GROVE, J. I am of the same opinion. The first question is whether the contract between Bridgett and the plaintiffs passed with the reversion. The answer to that is, that, not being by deed, it was not within the statute 32 Hen. 8, c. 34. The next question is whether there was any recognition of that agreement by the mortgagees or by the present defendant. Now, there is some evidence of recognition by the mortgagees. In the first place, they gave the plaintiffs a notice to quit. Whether that was or was not a recognition of a tenancy may be an arguable question: but, coupled with the subsequent receipt of the Michaelmas and Christmas rent, there was some evidence to go to the jury. But that becomes quite immaterial unless it is shewn that, by operation of law, or by some act of the defendant, there was a recognition of the original tenancy or some new contract assented to by him. The payment to the mortgagees of rent which became payable before the defendant's title accrued could not affect him. Having no right himself, he was not in a position to admit a tenant. Then, was there a recognition of the original tenancy by the defendant himself after he acquired the property? or was there any new contract? By a new contract is not necessarily meant a new substituted contract, but a new contract as to the parties. Did the defendant by any act of his adopt Bridgett's contract? Was there a fresh contract between him and the plaintiffs engrafting the terms of the original agreement? At the most, that was a question for the jury, as it was in *Buckworth* v. *Simpson*. (1) The only evidence against the defendant is, that he went on supplying steam-power. But the question is whether the evidence was such that the jury were bound to infer some such contract. Upon the whole, it seems to me that the evidence was pretty equally balanced between the one view and the other. The defendant was willing to enter into a new contract of tenancy upon terms which the plaintiffs were not willing to accede to. The evidence was consistent with the relation of negotiators rather than with that of landlord and tenant. The parties were not ad idem. They were discussing the matter to the last. I think there was strong evidence to shew that the defendant never did recognise the original contract. At all events, it is impossible to say that it was not a question for the jury; and I should certainly say that the evidence preponderated in favour of the defendant. I think there was no misdirection, and that the finding of the jury was quite right.

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(1) 1 C. M. & R. 834.

HONYMAN, J. I am of the same opinion. The original demise not being under seal, the statute 32 Hen. 8, c. 34, did not apply, and the defendant was not bound by it: *Standen* v. *Christmas*. (1)

Rule discharged.

Attorneys for plaintiffs: *J. L. P. Eyre & Co., for D. W. Heath, Nottingham.*

Attorneys for defendant: *Aldridge & Thorn, for F. Acton, Nottingham*

Feb. 6.

APPLEBY *v.* JOHNSON.

Contract, Evidence of—Acceptance of Offer with a Reservation.

The plaintiff, who proposed to enter the service of the defendant, a calico-printer, as salesman, on the 21st of September wrote as follows:—"Referring to my conversation with you, I have now the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms, viz. a list of merchants to be regularly called on by me to be made, and corrected as occasion requires. My salary for the year to be 120*l.*, and in addition a commission of ½*d.* per piece on all sales effected or orders taken by myself, &c. If the terms herein specified are in accordance with your ideas, kindly confirm them by return, and I will prepare to enter on my duties at your warheouse on

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(1) 10 Q. B. 135; 16 L. J. (Q.B.) 265.

Monday morning next." The defendant on the following day replied,—"Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall therefore expect you on Monday." Then followed this postscript,—"I have made a list of customers, which we can consider together:"—

Held, that these two letters did not constitute a binding contract in writing, the defendant's answer not being an absolute and unqualified acceptance of the plaintiff's offer.

ACTION against the defendant, a calico-printer at Manchester, for alleged wrongful dismissal of the plaintiff, a salesman, from his service.

The cause was tried before Brett, J., at the last Summer Assizes at Manchester, when the following letters were relied upon by the plaintiff as containing the terms of his engagement by the defendant:—

"J. Appleby, Esq. "21st September, 1871.

"Dear Sir,—Referring to my conversation with you, I have now the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms, viz. a list of the merchants to be regularly called on by me to be made, and corrected as occasion requires. My salary for the year to be 120*l.*, and in addition a commission of ½*d.* per piece on all sales effected or orders taken by myself; also on all return orders received for patterns given out directly by me to any of my customers, whether such orders are received by me or others; and ¼*d.* per piece to be allowed to me on all casual sales made in your warehouse by others than myself to any of my regular list of customers.

"If the terms herein specified are in accordance with your ideas, kindly confirm them by return, and I will then prepare to enter on my duties at your warehouse on Monday morning next; and trust by energetic and persevering work to effect a mutually favourable result to the engagement.

(Signed) "A. J. Johnson."

"Mr. A. J. Johnson. "September 22nd, 1871.

"Dear Sir,—Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a

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little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday.

(Signed) "J. Appleby.

"P.S. I have made a list of customers, which we can consider together."

The plaintiff accordingly entered into the defendant's service as salesman on the 25th of September, 1871, and the defendant supplied him with a list of customers upon whom he was to call. He continued in the defendant's employ down to March, 1872, without any disagreement. But, in consequence of some dispute as to commission on certain orders, the plaintiff about this time intimated to the defendant that he should terminate his engagement at the expiration of the year for which he was engaged.

On the 3rd of May, 1872, the defendant gave the plaintiff a month's notice to quit, relying upon a supposed custom of the trade.

Evidence was offered on the part of the defendant, that, at an interview between the parties after the interchange of the above letters, and before the service was entered upon, it was verbally agreed that the hiring should be subject to the customary month's notice.

The learned judge, however, ruled that the contract was complete by the two letters of the 21st and 22nd of September, 1871, subject only to the terms being more clearly expressed, but not to any alteration of those terms: and he accordingly refused to receive the evidence tendered.

A verdict having been found for the plaintiff for 65*l.* 15*s.* 5*d.*,

Pope, Q.C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of the improper rejection of evidence. He cited *Wallis* v. *Littell* (1), *Rogers* v. *Hadley* (2), and *Malpas* v. *London and South Western Ry. Co.* (3)

Herschell, Q.C., and *Taylor*, shewed cause. The two letters constituted a complete contract between the parties; and parol evidence was not admissible to vary its terms. It was a contract which required to be in writing, being for a year's service to commence on a future day. To allow parol evidence of a subsequent conversation shewing that the absolute contract for a year's service was to be subject to the customary trade notice of a month, would be letting in all the mischief which the Statute of Frauds was intended to prevent. That was not "more clearly defining" the terms which had for all practical purposes been already agreed on, but adding an entirely new term. In *Noble* v. *Ward* (1), a contract in writing was made for the sale of goods above 10*l.* in value, to be delivered at a future time. Before the time for the delivery arrived, the parties made a parol agreement extending the time: and it was held that the parol agreement, being invalid under the Statute of Frauds (29 Car. 2, c. 3), s. 17, did not effect an implied rescission of the former contract. In *Wallis* v. *Littell* (2), there was no complete contract: it was subject to the approval of a third person. Here, it was by no means of necessity that there should be any further definition of the terms proposed by the plaintiff's letter. If the defendant's letter was not an absolute acceptance of the plaintiff's offer, the words "We shall expect you on Monday" would be meaningless.

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(1) 11 C. B. (N.S.) 369; 31 L. J. (C.P.) 100. 8 Jur NS 745

(2) 2 H. & C. 227; 32 L. J. (Ex.) 241. 9 Jur NS 898

(3) Law Rep. 1 C. P. 336. 12 Jur NS 276

Pope, Q.C., and *Hopwood*, in support of the rule. Although parol evidence is not admissible to contradict or vary the terms of a written contract, it is always competent to either party to shew that that which apparently is the contract is in truth only part of it. If, therefore, the two letters constituted a complete contract, parol evidence was not admissible. It was, however, for the jury, not for the judge, to say in the first instance whether or not the two letters did constitute a complete contract. It is not until that is ascertained that the duty of the judge to construe the written contract arises. Here, the learned judge assumed the functions of the jury in that respect, and nothing was left to them.

[GROVE, J. If you are right, parol evidence would always be admissible, however clear the written contract might be. The learned judge being of opinion that the two letters constituted a complete contract, there was nothing to leave to the jury.]

(1) Law Rep. 1 Ex. 117; in error, Law Rep. 2 Ex. 135. 12 Jur NS 167

(2) 11 C. B. (N.S.) 369; 31 L. J. (C.P.) 100. 8 Jur NS. 745

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In *Malpas* v. *London and South Western Ry. Co.* (1), A., by parol, made arrangements with the defendants, a railway company, to carry cattle for him to K. station; he at the same time, but without noticing its contents, signed a consignment-note, by which the cattle were directed to be taken to E., an intermediate station on the line to K.: and this Court held that parol evidence was admissible to shew that the defendants had agreed to carry on the cattle to K., as it did not contradict, but only supplemented the written contract.

[HONYMAN, J. What effect does Mr. Herschell give to the postscript, "I have made a list of customers, which we can consider together?" Does not that shew that there was something to be done before there was a complete engagement?]

Taking the whole language of the letters together, it does not disclose such an absolute and unconditional contract as to preclude the admission of parol evidence to explain it.

KEATING, J. The question is, whether the two letters of the 21st and 22nd of September, 1871, constituted a complete contract between the parties; because there can be no dispute that, if there was a complete contract in those letters, the contract being one for which writing is necessary, that contract could not be varied by anything which subsequently passed between the parties by word of mouth. After full consideration, I have come to the conclusion that those letters do not constitute a complete contract. The plaintiff, who was proposing to enter into the service of the defendant as salesman, writes, "I have the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms." The first term is, "A list of merchants to be regularly called on by me to be made, and corrected as occasion requires." No doubt, corrections would from time to time be required. But the list was in the first instance to be made. The letter goes on, "My salary for the year to be 120*l.*, and in addition a commission of ½*d.* per piece on all sales effected or orders taken by myself, also on all return orders received for patterns given out directly by me to any of my customers, whether such orders are received by me or others." I take the meaning of that to be, that, besides the stipu-

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(1) Law Rep. 1 C. P. 336. 12 Jur NS 271

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lated salary, the plaintiff was to have a commission of ½*d.* per piece on all orders procured by him from the customers named in the list to be made out. It then goes on, "and ¼*d.* per piece to be allowed to me on all casual sales made in your warehouse by others than myself to any of my regular list of customers." There was, therefore, as it seems to me, to be an appropriation of a set of customers upon whose dealings the plaintiff was to have a commission. Then the letter concludes, "If the terms herein expressed are in accordance with your ideas, kindly confirm them by return, and I will then prepare to enter on my duties at your warehouse on Monday morning next." The defendant's answer is as follows:—"Yours of yesterday embodies *the substance* of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday." I do not think that is the way in which mercantile men usually make a contract. My opinion of the letter, stopping there, is, that it is not an unconditional and definitive acceptance of the plaintiff's proposal, or, as the plaintiff puts it, a confirmation of his letter. Then comes this postscript,—"I have made a list of customers, which we can consider together." That has reference to an important term in the proposed contract, viz. the amount of the commission, which was to be the subject of further discussion. It seems to me, therefore, that the two letters did not constitute a complete contract, and consequently that the foundation of Mr. Herschell's argument fails. I may say that my Brother Brett at Nisi Prius took a different view. He thought the letters constituted a complete contract, and that no new terms could be added by parol evidence, and consequently he rejected it. It seems to me that he was wrong, and that the rule must be made absolute.

GROVE, J. I am of the same opinion. Questions of this sort are constantly arising. Where a contract is to be made out by an offer on one side and an acceptance on the other, if the answer is equivocal or anything is left to be done, the two do not constitute a binding contract. It seemed to me very early in the argument that the letter of the 22nd of September did not amount to an unequivocal acceptance of the offer contained in the plaintiff's

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letter of the 21st. The second letter refers to terms which required to be further considered, to make a final agreement. If the acceptance is not clear and certain, but leaves something to be arranged, something for future discussion and decision, the parties are not ad idem. Some stress has been laid on the words in the defendant's letter, "We shall, therefore, expect you on Monday." But those words do not shew that there was a conclusive acceptance of the plaintiff's offer. Then comes the postscript, which is not unimportant: it shews that there were some of the elements of a contract which remained to be settled and ascertained between the parties, something that was still in fieri. It involves something which may be an alteration,—a more clearly defining of something which may be the essence of the contract. In fact, one of the most important terms, viz. the amount of commission the plaintiff was to receive, is left undefined. I cannot say that the defendant has by his letter done what the plaintiff asked him to do, viz. confirm his offer. There was, therefore, no complete agreement, and the rule for a new trial must be made absolute.

HONYMAN, J. I have come to the same conclusion, though with some reluctance. This was a contract which was required to be in writing, inasmuch as it was not to be performed within a year. If the two letters of the 21st and 22nd of September constituted a binding contract, the evidence which was offered was inadmissible. Therefore the question really is, whether there was or was not a binding contract between the parties on the 22nd of September. The difficulty arises from that which often happens in these cases. Instead of answering the plaintiff's letter by writing "I accept your offer," or "I agree to your terms," the terms are repeated or assented to with a variation. I should have come to that conclusion upon reading that part of the defendant's letter which precedes his signature. I should say it amounts to this: "We are substantially agreed as to the terms of your engagement; but, if we can hereafter define some of them a little more clearly,—that is, define them in writing,—so much the better. If not, I agree to your terms." But then there is this further provision in the postscript. The plaintiff was to have a salary of 120*l.* for the year, and a commission on sales to customers whose names were to appear on a list, "which we can consider together." Until the list should be agreed to, there was nothing to shew what commission the plaintiff was to be entitled to. I come to the conclusion that the parties never were ad idem, and that it was open to the defendant to shew by parol that before they did agree there were terms insisted upon by him which the plaintiff did not assent to. The allegations in the declaration, therefore, are not made out.

Rule absolute.

Attorneys for plaintiff: *Pritchard, Englefield, & Co., for Grundy & Kershaw, Manchester.*

Attorneys for defendant: *Phelps & Sidgwick, for Sale, Shipman, & Seddon, Manchester.*

MAUDE AND OTHERS, PETITIONERS; LOWLEY, RESPONDENT.

Jan. 23.

Municipal Election—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60)*—Particulars—Reg. Gen., Michaelmas Term,* 1872, *No.* 6*—Amendment of Petition.*

1 CPD. 417.
10 QBD 29

An order having been made by a judge at Chambers, under the 6th of the General Rules made under the Corrupt Practices (Municipal Elections) Act, 1872, for the delivery of particulars by the petitioners to the respondent, stating by whom, when, and where persons alleged to have been bribed and treated had been so bribed and treated, and by whom, when, and where canvassers had been employed and moneys paid for the conveyance of voters to the poll,—the order was allowed by the Court, with the addition of the words "so far as known."

A petition against the election of a town-councillor cannot, after the expiration of the twenty-one days limited by s. 13, subs. 2, for its presentation, be amended by the introduction of a substantially new charge.

The petition as originally framed complained of the employment, contrary to the prohibition contained in s. 7, as paid canvassers, at an election for the north ward of the borough, of persons who were on the register of burgesses for *that ward.* The petitioners after the expiration of the twenty-one days sought to amend the petition by adding "and other wards:"—

Held, that the Court (or a judge) had no power to allow the proposed amendment.

This was a petition against the return of the respondent as a town councillor for the borough of Leeds, under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60).

Pollock, B., had made an order at Chambers, under the 6th of the General Rules made under the Act, for the delivery by the petitioners to the respondent of particulars of all persons alleged to have been bribed and treated, by whom, when, and where; of all persons alleged to have been retained and employed as canvassers, by whom, when, and where; and of all persons to whom money was paid or agreed to be paid on account of conveyance of voters to the poll, and by whom, when, and where such moneys were paid or agreed to be paid.

A rule nisi had been obtained to rescind the order so far as it related to giving particulars by whom, when, and where the bribing and treating, the employment of canvassers, and the payment for conveyance of voters to the poll had been effected.

Charles shewed cause against the rule. The case of *Beal* v. *Smith* (1) only decides that when the judge at Chambers has, in the exercise of his discretion, refused to order particulars of the names of the parties bribing and treating, the Court will not interfere with the exercise of his discretion. It is not an authority that when the judge, in his discretion, has ordered these particulars, the Court will interfere.

[LORD COLERIDGE, C.J. It appears, however, that the form of the order made in that case was settled by Willes, J., after consultation with Martin and Blackburn, JJ.]

It would rather seem that there must have been special circumstances in the case, because, in the case of the *Hastings Petition* and the *Stafford Petition* (2) Mr. Justice Blackburn appears to have made a more extensive order than that in *Beal* v. *Smith.* (1) There particulars were ordered to be given of the persons guilty of corrupt practices.

[LORD COLERIDGE, C.J. The report does not state what the nature of the corrupt practices was. It might have been intimidation, as to which different considerations would apply].

In later cases particulars such as those now asked for appear to have been given: see *Anderson* v. *Cawley* (3); the *Londonderry Petition* (4); *Brett* v. *Robinson.* (5) A list of the names of the persons bribing has been ordered; why not a list of the persons treating?

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(1) Law Rep. 4 C. P. 145.

(2) 20 L. T. (N.S.) 180.

(3) 19 L. T. (N S.) 500.

(4) 19 L. T. (N.S.) 573.

(5) 22 L. T. (N.S.) 487.

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[LORD COLERIDGE, C.J. The only authority for ordering particulars of the time and place is with respect to acts of treating, and that appears to have been qualified by the words "so far as known."]

What difference is there between acts of treating and bribing in this respect?

[KEATING, J. Treating, in the nature of things, generally takes place in public-houses and more in public, but bribing is effected in holes and corners. It is conceivable that the petitioners might have evidence that parties were bribed, and yet not be able to specify by whom they were bribed, and when and where.]

There is no objection, on the part of the respondent, that the order should be qualified by the words "so far as known." The object of particulars is to enable the respondent to prepare for his defence; and he must, for that purpose, find out what is the case which he has to meet.

Field, Q.C., and *Lockwood*, supported the rule. It is the duty of the petitioners to give all reasonable information as to their case to the respondent, but they ought not to be tied down by too stringent particulars. It may often not be possible to give the names of the bribers; but the respondent would have no objection to the order if qualified by the words "so far as known." The same considerations apply to the particulars of the time and place when and where the bribing happened, and to the remainder of the particulars.

PER CURIAM. (1) The order had better be varied in the form suggested, viz. by the addition of the words "so far as known."

Rule absolute accordingly.

Jan. 30, 1874. The election took place on the 4th of December, 1873. The petition was filed on the 29th. The 5th and 6th paragraphs were as follows:—

"5. And your petitioners further say that the said James Lowley

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(1) Coleridge, C.J., Keating and Honyman, JJ.

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did personally retain and employ persons who were included in the register for the said ward (1) of the said borough as burgesses for payment and reward at the above election as canvassers for the purposes of the said election, whereby the election of the said James Lowley was void.

"6. And your petitioners further say that the agents or agent of the said James Lowley did, with his knowledge and consent, retain and employ persons who were included in the register of the said ward of the said borough as burgesses for payment and reward at the above election as canvassers for the purposes of the said election, whereby the election of the said James Lowley was void."

On the 16th of January, 1874, Pollock, B.,—upon an affidavit of the solicitor and agent of the petitioners that he had since the presentation of the petition become aware that persons included in the register for wards of the borough other than the north ward thereof as burgesses were retained and employed, for payment and reward, by or on behalf of the respondent, as canvassers for the purposes of the election,—made an order that the petitioners be at liberty to amend the petition by inserting the words "and other wards" after the words "the said ward," in the fifth and sixth paragraphs, upon payment of costs.

Jan. 28. *Sanderson Tennant* obtained a rule nisi to set aside the order of Pollock, B., on the ground that it was in effect allowing the petitioners to file a fresh petition after the lapse of the twenty-one days limited by s. 13, subs. 2, of the Corrupt Practices (Municipal Elections) Act, 1872. He referred to a dictum of O'Brien, J., in the *Youghall Case.* (2)

Cave and *Lockwood* shewed cause. Sect. 5 of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), avoids the election of a candidate guilty of any offence against the Act. Sect. 7 enacts that "no person who is included in a register for a borough or ward thereof as a burgess or citizen shall be retained or employed for payment or reward by or on behalf of a candidate at an election for such borough, or any ward thereof, as a canvasser for the purposes of the election," and imposes a penalty upon both employer and employee. Here, the petition, as it originally stood, charged the respondent with having employed as paid canvassers persons who were on the register for the ward for which the election took place. The petitioners having reason to believe that persons on the register for other wards of the borough had been similarly employed, obtained the order now excepted to. Sect. 13, subs. 2, requires that the petition shall be presented within twenty-one days after the day on which the election was held, except in an event which has no application here. By s. 21, subs. 5, it is provided that "the superior Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if the petition were an ordinary cause within its jurisdiction." That necessarily includes the power to amend the petition. It is said that the allowing such an amendment as this is in effect making a new petition, and thus evading the provision for the limitation of the time for filing it. But, under rule 6 of the Rules of Michaelmas, 1872, the petition is general in form, and the power of ordering particulars,—even pending the trial, *Cheltenham Election Petition* (1),—would be open to the same objection, if it be one. Where the Court once has seisin of the petition, all rules of procedure, including those relating to amendment, necessarily follow.

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(1) The north ward.

(2) 1 O'Malley & H. 295, 296.

[HONYMAN, J. Could you amend, by inserting a charge of treating in a petition which originally charged bribery only, after the expiration of the twenty-one days?]

It might be difficult to introduce another description of offence. But here the offence charged is the employing as a paid canvasser one who has a vote for the borough. The amendment leaves the original charge untouched. Suppose the petition had alleged the employment of A., B., and C., by name, would not a judge have power to add D. and E.? The particulars may be amended. Why not the petition? An amendment has been allowed in a penal action, even after the expiration of the time for bringing a new action: *Maddock* v. *Hammet.* (2)

(1) 19 L. T. 820. (2) 7 T. R. 55.

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[LORD COLERIDGE, C.J. The question is, whether the amendment in reality makes this a new petition within the meaning of the Act of Parliament. It must be remembered that our jurisdiction in these matters is limited.]

The only effect of allowing this amendment will be to obviate its unnecessary particularity.

[KEATING, J. The petition must disclose all the facts and grounds on which the petitioners rely: see Rule 3.]

This may be treated as a mere mistake or omission.

Tennant, in support of the rule. The 7th section of the Act is applicable to two distinct cases,—one, the case of boroughs which are not divided into wards; the other, to boroughs which are so divided. It creates two distinct classes of offences,—one, the employment as paid canvassers of persons entitled to vote for the particular ward to which the election relates; the other, the employment of persons entitled to vote in other wards. The petition as originally framed charged the respondent with the commission of the former of those offences; the amendment introduces the latter. That is introducing a totally different charge. It may be that the petitioners may fail at the trial to substantiate any part of the charges except those inserted by way of amendment. The petitioners were bound to specify the charges particularly. A petition alleging corrupt practices at the election generally would be bad. Sect. 21, subs. 5, does not impower the Court to allow an amendment which will defeat an important provision of the Act. Such an amendment has never yet been allowed; and the *Youghall Case* (1), slight as it is, is at all events some authority to shew that no such power exists.

[KEATING, J. In *Stevens* v. *Tillett* (2), Byles, J., amended a petition by striking out charges of personal bribery, &c.; and upon application to the Court they were restored. It does not appear that the objection of want of jurisdiction was urged there.]

That was not an attempt to present a new petition after the twenty-one days; but merely an abandonment of a charge. By s. 13, subs. 1, a copy of the petition when filed is to be sent to the

(1) 1 O'Malley & H. 295, 296.

(2) Law Rep. 6 C. P. 147.

town-clerk of the borough to which it relates, and he is forthwith to publish it in the borough. It never could have been intended that the petition should be altered after publication. The respondent is to find sureties. The amendment might have the effect of altering the position and enlarging the liability of the sureties. The limits of a statutory jurisdiction must be observed strictly. Under 20 & 21 Vict. c. 43, notice of appeal against a magistrate's decision must be given within three days. That has repeatedly been held to be imperative. So, as to notices of action: there are numerous cases where the plaintiff has been nonsuited on the ground that the cause of action proved did not correspond with that stated in the notice. So, upon the same principle, amendments are not allowed for the purpose of obviating the application of the Statute of Limitations: *Goodchild* v. *Leadham.* (1)

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute, on the ground that the learned Baron had no jurisdiction to make the amendment. That is the only question before the Court; for, if it is a matter of discretion, we do not as a general rule interfere with what the judge has done. I, therefore, for one, would decline to express any opinion of what my Brother Pollock decided as matter of discretion. I think the learned Baron had no discretion in the matter. This was a petition presented against the return of a councillor, under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60). In dealing with it we must be governed entirely by the provisions of the statute. The statement in the petition, as it originally stood, was, that "the said James Lowley did personally" [or, "that the agents or agent of the said James Lowley did, with his knowledge and consent,"] "retain and employ persons who were included in the register of the said [North] ward of the said borough as burgesses for payment and reward at the above election as canvassers for the purposes of the said election, whereby the election of the said James Lowley was void." The order of Pollock, B., was, to enable the petitioners to add in the fifth and sixth paragraphs, after "the said ward," the words "and other wards." The 7th section of the Act provides that "no person who is included in a register for a borough or ward thereof as a burgess or citizen shall be retained or employed for payment or reward by or on behalf of a candidate at an election for such borough or any ward thereof as a canvasser for the purposes of the election." There are two classes of offences possible to be stated separately under that section, viz. the employment as paid canvassers at the election of voters who live within the ward, and the employment as paid canvassers of voters living in other wards than that to which the election relates. In this particular case, the election took place on the 4th of December, 1872: it was a bye-election, the necessity for which arose from the death of a councillor elected in the preceding November, and consequently it had reference to one ward only of the borough. That being so, a petition against the election of the respondent was duly presented within the time prescribed by the statute, viz. on the 29th of December, containing a good allegation of a specific charge which constituted an offence within the Act. On the 14th of January, 1874, which was after the prescribed period, the petitioners go before the learned Baron and propose to amend their petition by inserting therein the words I have mentioned; so that the petition as amended would read, "did retain and employ persons who were included in the register for the said ward *and other wards* of the said borough," &c. Thus, there being, as I before observed, two classes of offences included within the words of s. 7, the petition as presented specified one class, and as amended both classes. The question is whether the Court or a judge had jurisdiction to make such an amendment as that.

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(1) 1 Ex. 706; 17 L. J. (Ex.) 90.

Subs. 5 of s. 21, which deals with the jurisdiction of the Court, is as follows:—"The superior Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if the petition were an ordinary cause within its jurisdiction." It may be taken, therefore, that, if not limited and restrained by the Act, this Court would have power to amend the petition. But I am of opinion that the words "subject to the provisions of this Act" do limit and restrain the power of the Court, and prevent the exercise of the jurisdiction sought to be exercised in this case. The 2nd subs. of s. 13 of the Act, which prescribes the time within which a petition shall be presented, enacts that "a petition shall be presented within twenty-one days after the day on which the election was held, unless it complain of the election on the ground of corrupt practices, and specifically allege a payment of money or other reward to have been made or promised since the election by a person elected at the election, or on his account or with his privity, in pursuance or furtherance of such corrupt practices, in which case it may be presented at any time within twenty-eight days after the date of the alleged payment or promise, whether or not any other petition against such person has been previously presented or tried." The enactment is distinct, that the petition must be presented within twenty-one days, except in the one specified case of an offence, not discovered since the election, but which has taken place since the election; and in such case the petition may be presented at any time within twenty-eight days, not after the discovery of the offence, but from the taking place of that which constitutes the offence. That is extremely strong to shew the intention of the legislature that, except in the specifically excepted case, the petition must be presented within twenty-one days after the day of the election.

Then, does the introduction of the additional allegation make this in effect a new petition? It is said that it is merely expanding and making more plain that which is already expressed. But that is not, in my opinion, a well-founded contention, because the petition as originally framed charges only one of the offences pointed out by s. 7, and as amended it charges both. To allow such an amendment, therefore, would far exceed the jurisdiction given by s. 21, subs. 5. We are much indebted to Mr. Tennant for his very clear and able argument, in which he has brought to our notice other provisions of the Act which all tend to the same conclusion. He points to the provision that the petition, signed by the petitioner, shall be presented in the prescribed manner, and that the officer shall forthwith send a copy to the town-clerk, and that the town-clerk shall forthwith publish it, as affording a strong reason for contending that the legislature contemplated that it should be once for all ascertained what the petition is, and that when once filed there should be no amendment. He also calls attention to subs. 3. of s. 13, which requires the petitioner to give security for the costs of the petition, and suggests, and with great justice, that a surety may fairly say that, seeing one specific offence only charged, and being satisfied that that charge would be made out, he was content to enter into the recognizance; but that, if the allegation in the petition is afterwards allowed to be altered, he may say that, if the charge had been so framed originally, he would not have consented to become such surety. That seems to me to be a just and well-grounded argument. The respondent has a right to know once for all within the twenty-one days what are the precise charges which he has to meet, and may then destroy any documents and vouchers he may possess that might have reference to any other charges. Mr. Tennant has also pointed out that, after the expiration of the twenty-one days, it would be too late for any one else to present a fresh petition; and that to allow a petitioner to amend so as substantially to make the amended petition a fresh one, would be conferring upon him a privilege which no other person could possess. That seems to me to dispose of the case.

I am quite conscious that it may be said that the difficulty here might have been avoided by a more vague and general description of the offence in the petition, and that in that case the respondent would have been placed in a far more disadvantageous position than he would be in if the amendment in question were allowed. But it does not seem to me that that argument is well founded in point of fact; for, the Court would not allow the respondent to be prejudiced by any undue generality in the statement of the charge in the petition, and might meet the difficulty by ordering particulars to be given. It is, however, unnecessary to enter into any speculation of that sort. If the words of the Act are imperative in this respect, we have nothing to do with what might be the result in other cases. Whatever the consequences, we must deal with the language of the Act as we find it. It is true that there is no direct authority upon the point: but there are analogies more or less forcible, all of which are opposed to the existence of the jurisdiction we are called upon to exercise in this case. I think the rule for setting aside my Brother Pollock's order should be made absolute.

KEATING, J. I also think this rule should be made absolute. It was clearly the intention of the legislature that the persons elected should know within a limited time whether or not their election was to be questioned, and also the grounds upon which it was to be questioned. And for that purpose subs. 2 of s. 13 requires that the petition shall be presented within twenty-one days, save in the excepted case of bribery since the election. Anything which materially adds to the charge, especially if it introduces an additional charge, would constitute not an amendment but a fresh petition. For the reasons given by my Lord, in which I entirely concur, I think the Court clearly has no jurisdiction to allow such an amendment as was allowed by the order of my Brother Pollock.

DENMAN, J. I must confess I have entertained considerable doubt during the discussion of this rule as to whether the Court had jurisdiction to allow the amendment in question or not; and those doubts have not been altogether removed. I cannot help thinking that it would not be an unreasonable construction of s. 7 of the Act to say that it points, not at two classes of offences, but at one offence consisting of the employment at the election as paid canvassers of persons who are included as burgesses in a register for the borough or any ward thereof, and that such offence was intended to be met by this petition; and that it is reasonably open to contention that a mere too great particularity in the statement of the charge was matter of description which was amendable by the Court or a judge. But my Lord and my learned Brothers entertain a strong opinion that the alteration here allowed by the learned Baron was a substantial one and makes the petition in effect a new petition. That being so, I do not think my doubts ought to induce me to express a contrary opinion, because the particularity of the petition as originally framed might have induced the sureties and the respondent to think that there was only a limited case to meet, viz. the employment as paid canvassers of persons on the register of the North ward, and the amendment sets up a new charge. Under these circumstances, therefore, I cannot resist the conclusion that the amendment made the petition substantially a new one, and consequently ought not to have been allowed. For these reasons, though not without some doubt, I agree that this rule should be made absolute.

HONYMAN, J. I am of the same opinion. There is nothing in the Act or in the rules framed in pursuance of it to warrant this amendment. The 7th section requires the petition to be presented within twenty-one days after the election. Here, a petition was presented in time, charging the employment as paid canvassers of persons on the register of burgesses for the North ward of the borough. After the expiration of the twenty-one days, the petitioners seek to add a new charge, viz. the employment as paid canvassers of persons who are on the register of burgesses for other wards in the borough. I think that cannot be allowed. Suppose a petition to allege bribery only, could the petitioners be allowed afterwards to add a charge of treating? Or, suppose a qui tam informer sues for one penalty, would he be allowed to amend by introducing two or three more? I entertain a strong opinion that no such authority exists.

Rule absolute.

Agents for petitioners: *Paterson, Snow, & Co., for Joseph Walker, Leeds.*

Agent for respondent: *J. J. Darley, for Newstead & Wilson, Leeds.*

WILLIAMS AND ANOTHER *v.* HEALES.

1874
Jan. 26.

Executor de son Tort—Assignee of Term.

In 1810 a lease for 61¼ years was granted by the predecessors in title of the plaintiffs to one " H. G., his executors, administrators, and assigns." In 1814 H. G. died intestate. His widow administered to his effects, and remained possessed of the lease till her death, in 1843. After her death, G. S. Heales (the father of the defendant), who had married a daughter of H. G., without any administration took possession of the premises and received the rent, paying the ground-rent; and he continued to do so until his death, in 1856.

After the death of G. S. Heales, the defendant received the rent of the premises, and, after paying the ground-rent, handed over the balance to his mother, conceiving her to be entitled to it. He also from time to time let the premises.

After the death of his mother the defendant continued to receive the rent of the premises, paying the ground-rent, and dividing the balance between his two sisters and himself,—no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to the plaintiffs out of repair:—

Semble, that the defendant was executor de son tort of the term: But,

Held, that, beyond all doubt, he had estopped himself from denying that he was assignee.

ACTION for breaches of covenant to repair and for payment of rent. The cause came on to be tried before Grove, J., at the Middlesex sittings after Trinity Term, 1872, when a verdict was found for the plaintiffs for 66*l*. 6*s*., subject to the opinion of the Court upon the following case:—

1. The plaintiffs are trustees under the marriage-settlement of W. W. Williams and Mary Anne Davis, and they sue as assignees of the reversion for the breach by the defendant of the two covenants set out in the declaration, for not keeping the premises in repair, and for not paying two quarters' ground-rent of the premises demised.

2. By indenture of lease, dated the 10th of May, 1806, made between James Taylor of the one part and William Dalby of the other part, Taylor demised to Dalby, his executors, administrators, and assigns, certain land, parcel of which was the land on which the house in question stood, To hold the same for the term of eighty years from the 25th of March, 1803, at the yearly rent in that indenture mentioned.

3. By indenture of lease, dated the 29th of August, 1810, being

the lease containing the covenants set out in the declaration in this cause, and made between William Dalby of the first part, John Woods of the second part, and Henry Godden of the third part, Dalby demised unto Godden, his executors, administrators, and assigns, the ground and messuage then called 32 York Place, but now 381 City Road, for the term of 61¼ years (wanting ten days) from the 29th of September, 1809, at the yearly rent of 12*l.* 12*s.*, payable quarterly. This lease contained a covenant by Godden, his executors, administrators, and assigns, to pay the rent quarterly, and also a covenant to keep the house and premises in repair and deliver up the same in repair at the end of the lease.

4. By indenture of settlement of the 14th of February, 1820, made between William Dalby and Anne Dalby, daughter of William Dalby, of the first part, Samuel Knight of the second part, and R. Pearson and J. Stephenson of the third part, after reciting the lease to W. Dalby of the 10th of May, 1806, W. Dalby bargained, sold, and assigned to R. Pearson and J. Stephenson, their executors, administrators, and assigns, inter alia, the ground, messuage, and premises in York Place (now 381 City Road) demised by Dalby to Henry Godden by the indenture of lease dated the 29th of August, 1810, To hold unto Pearson and Stephenson, their executors, administrators, or assigns, upon certain trusts in the settlement mentioned.

5. After the death of Stephenson intestate (who survived his co-trustee Pearson), Sarah Stephenson, his widow, obtained letters of administration to the goods and effects of her late husband Joseph Stephenson.

6. By indenture dated the 24th of February, 1843, indorsed on the settlement of the 14th of February, 1820, and made between Anne Knight of the first part, Sarah Stephenson, the widow and administratrix of Joseph Stephenson, of the second part, W. Fortescue and J. Knight of the third part, and C. Williams and W. Fortescue the younger of the fourth part, Sarah Stephenson bargained, sold, and assigned unto C. Williams and W. Fortescue the younger, their executors, administrators, and assigns, all the premises mentioned and described in the indenture of lease of the 10th of May, 1806, and in the indenture of settlement of the 14th of February, 1820.

7. W. Fortescue the younger survived his said co-trustee C. Williams.

8. By indenture dated the 28th of September, 1867, made between W. W. Williams and E. Williams, trustees and executors of the will of C. Williams, of the first part, the said W. Fortescue the younger of the second part, the said W. W. Williams and Mary Anne his wife (formerly Mary Anne Davis) of the third part, and E. Williams and J. Williams (the plaintiffs) of the fourth part, W. W. Williams and E. Williams, as such executors as aforesaid, and the said W. Fortescue the younger, bargained, sold, and assigned unto the plaintiffs E. Williams and J. Williams, their executors, administrators, and assigns, the several messuages, lands, and premises comprised in the indenture of the 14th of February, 1820, which were then vested in them the assigning parties, or any or either of them, To hold to the said E. Williams and J. Williams, their executors, administrators, and assigns, upon the trusts therein expressed or referred to; and the reversion upon the lease of the 29th of August, 1810, in the third paragraph of this case mentioned, thereby vested and had ever since continued in the plaintiffs.

9. The defendant Heales is the grandson (through his mother) of Henry Godden, the lessee under the indenture of lease of the 29th of August, 1810.

10. Henry Godden, the lessee, was in possession of the said house up to the time of his death, and died intestate, leaving his widow, Anne Godden, and two daughters, Jane Cecilia and Sarah Anne, him surviving. The widow obtained administration to his effects on the 28th of January, 1814, and was possessed of the said lease up to the time of her death, and died intestate on the 16th of January, 1843. During her lifetime she received the rent of the house 381 City Road, and paid the ground-rent reserved by the lease of the 29th of August, 1810. Jane Cecilia married G. S. Heales, and was the mother of the defendant. Sarah Anne married William Taylor, and died in September, 1818.

11. No further administration had ever been obtained to the effects of Henry Godden, the lessee, other than that to his widow Anne Godden.

12. On the death of Anne Godden, G. S. Heales, the father of

the defendant, took possession by his tenants of the house 381 City Road, and paid the ground-rent reserved by the lease of the 29th of August, 1810, and remained in such possession up to the time of his death, on the 17th of December, 1856.

13. From the time of the death of his father, G. S. Heales, the defendant, Alfred Heales, received the rent of the said premises, and, after paying the ground-rent, paid over the balance to his mother, regarding her as entitled to receive the same as her own. He also from that time let the premises to several tenants, from whom he received the rent as aforesaid. The defendant continued so to receive the said rent and pay over the balance to his said mother in the manner aforesaid up to the time of her death, which happened on the 16th of April, 1863.

14. In the year 1859, the defendant let the house to a Miss Wilkinson, at the annual rent of 60*l.*, and she continued his tenant until her death in 1867. After the death of Miss Wilkinson, her executor, Mr. H. Goudge, paid the quarter's rent due for the house up to Michaelmas, 1867; and, before another quarter's rent became due, the executor gave up possession of the house to the defendant on payment of 20*l.*, and the defendant acknowledged the same in a letter of which the following is a copy:—

"16th September, 1867.

"Dear Sir,—I have to acknowledge the receipt of your cheque for 20*l.* in discharge of all claims which I have against you in respect of house No. 381 City Road under the agreement upon which I let it to the late Miss Wilkinson.

"Alfred Heales."

15. After the decease of the widow of G. S. Heales, the mother of the defendant, he continued to receive the rent of the premises; and the same, after payment by him of the ground-rent, was divided by him in equal proportions between himself and his two sisters, on the assumption that they were entitled to receive the same in such proportions, as their own.

16. From the year 1857, the defendant had paid to the plaintiffs, through their agent W. W. Williams, the rent of the house as it accrued due, of 12*l.* 12*s.* per annum, reserved under the lease granted to Henry Godden, dated the 29th of August, 1810, except

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Williams *v.* Heales.

the two quarters' rent for which a breach is alleged for non-payment thereof in the declaration.

17. On the determination of the lease, the defendant having up to that date received the rent of the premises, and divided the same between himself and his said sisters, as mentioned in the 15th paragraph, delivered up possession of the house and premises to the plaintiffs out of repair.

18. The agreed amount of damages for such non-repair is 60*l.*, and that sum with 6*l.* 6*s.* for the two quarters' rent makes up the 66*l.* 6*s.* for which the verdict is taken.

19. The defendant is executor of his father, the said G. S. Heales.

20. It was agreed that the Court should be at liberty to draw any inferences or find any facts which in the opinion of the Court a jury ought to have drawn or found.

The question for the opinion of the Court was, whether the defendant was liable in this action; and if the Court should be of that opinion, the verdict was to stand; but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

Udall (*Parry*, Serjt., with him), for the plaintiffs. It is admitted that the plaintiffs are entitled as assignees of the reversion. The case states that, from the death of his father in 1856, the defendant has received the rent of the premises in question, paying the ground-rent to the plaintiffs. He thus became executor de son tort. He is also liable as assignee, having become tenant to the plaintiffs and admitted them to be his landlords. In 1 Williams on Executors, 7th ed. 915, it is said: "An administrator de bonis non is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie, and were not administered by the first executor or administrator. Also it is holden that if an executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go to the administrator de bonis non, being as easily distinguished to be part of the testator's effects as goods in specie."

[Brett, J. G. S. Heales, the father, was executor de son tort.]

He might have been. The defendant claiming to be in by the contract, the plaintiffs as reversioners have clearly a remedy against him upon the contract: *Mayor, &c., of Norwich* v. *Johnson.* (1) That case was affirmed in error (2), the Court in giving judgment saying: "It would be an infinite trouble for him in the reversion to seek his remedy for waste done, if the law did oblige him to stay till there was a rightful administrator; and it is not to be doubted but that there may be an executor de son tort of a term for years." Since the time of Lord Raymond, it has always been usual to declare against an executor as an assignee. The reversioners, finding one in possession who pays them the rent, could only charge him upon the covenant: and he was estopped from denying that he was tenant.

Prentice, Q.C. (*G. Francis* with him), for the defendant. Upon the death of the lessee, Henry Godden, in 1814, his widow, Ann Godden, obtained administration to his effects, and the estate in this term remained in her until her death in 1843. Upon her death, G. S. Heales, the defendant's father, took possession, and so became executor de son tort; and the estate remained in him until his death, in 1856. The contention of the plaintiffs is that, after that event, the present defendant became executor de son tort by reason of the acts done by him as described in paragraphs 13 and 14 of the case. But all those acts were done by him as the agent of his mother. The defendant, as executor of his father, is not responsible for any acts done by his father as executor de son tort: *Anonymous.* (3) And in *Paull* v. *Simpson* (4) it was held that a party who knowingly receives a chattel from an executor de son tort, and deals with it as his own, does not himself become thereby executor de son tort. Patteson, J., there says (5): "The authority of Godolphin (6) is precise on the point that, if one takes goods of the deceased and hands them to another, this shall charge only the giver as executor de son tort. And, in the present case, if there was no evidence that the defendant was executor de son tort, there was no evidence that the assignment came [to him] by operation of law." It is not enough to shew that the defendant is estopped from saying that he was tenant. The plaintiffs must shew that the whole estate vested in him, and that he is assignee of the lease. In *Hill* v. *Curtis* (1), it was held that, if an executor de son tort hands over part of the property of which he has wrongfully possessed himself to a second person, that person may possibly be sued in equity, but he is not liable as executor de son tort.

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(1) 3 Lev. 35.

(2) 3 Mod. 90.

(3) 2 Mod. 293.

(4) 9 Q. B. 365.

(5) 9 Q. B. at p. 370.

(6) Godolph. Orphan's Legacy, p. 91.

[DENMAN, J. The ground of the decision in that case is thus stated in 1 Williams on Executors, 7th ed. 264 (*n*): "It was held by Wood, V.C., that, where A. took possession of goods as the agent of B. and by his order, and B. afterwards took out administration, the agency and order prevented the act of A. from being the act of an executor de son tort; for that the tort of B. was purged by his becoming administrator, and his order became rightful ab initio, so that the agent's act was also purged."

BRETT, J. If a stranger would be liable as executor de son tort, would the defendant be less so because he is his father's son?]

Udall was not called upon to reply.

KEATING, J. This action is brought against the defendant upon the covenants contained in a lease dated the 29th of August, 1810, made by one William Dalby, by which the premises in question were demised to one Henry Godden for a term of 61¼ years (wanting ten days) from the 29th of September, 1809, at the yearly rent of 12*l.* 12*s.*, and with the usual covenants to repair, &c. Henry Godden held the premises until his death; and on the 28th of January, 1814, his widow took out administration to his effects, and so became assignee of the term vested in Henry Godden, and was possessed of the lease until her death, which took place in January, 1843. She left two daughters, one of whom married G. S. Heales, and was the mother of the defendant. No further administration was taken out to the effects of Henry Godden; but G. S. Heales entered into the receipt of the rent, and, after payment of the ground-rent, appropriated the balance to his own use. He died in December, 1856, and thenceforth the defendant (his son) entered so far into the possession of the premises that he let them and received the rent, paying the ground-rent, and handing over the balance to his mother during her life-time: and on her death, in April, 1863, he continued to receive the rents, and appropriated them to the use of his sisters and himself. He is now charged, as executor de son tort, as assignee of the term. I am of opinion that he is properly so charged. There seems to be no doubt that an executor de son tort may be charged as assignee of a term if he in any way interferes with the term. It has been contended that the defendant could not be so charged during the life-time of his mother, inasmuch as he merely received the rent as her agent: and perhaps the case of *Paull* v. *Simpson* (1) would justify that argument. In that case the defendant was sought to be charged in respect of a term handed to him by the widow of an intestate lessee without taking out administration: and the Court of Queen's Bench held that the holding possession of the premises during the life-time of the widow did not constitute the defendant an executor de son tort, so as to make him chargeable as assignee of the term. But here the defendant, upon the death of his mother, continued to take the rents and apply them to his own use. That case, therefore, seems to me to be an authority in point to shew that he thereby became executor de son tort so as to make him chargeable as assignee of the term; and he continued so until the end of the term, when the premises were given up out of repair and with rent unpaid. I think he is properly charged as assignee in respect of both. To hold otherwise would create an unjust state of things: the landlord can know but little of the way in which the estate devolves; and the defendant might take the profits and escape liability for the head rent. I think the plaintiffs are entitled to judgment.

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(1) Law Rep. 1 Eq. 90.

Brett, J. This action is brought by the plaintiffs against the defendant upon covenants in a lease of which he has become assignee, or with regard to which he has put himself in such a position that he cannot deny his liability as assignee. It should be observed that it is not an action brought by him, so as to make it incumbent on him to prove his title; but an action against him. The lease was granted to Henry Godden, his executors, administrators, and assigns, in the ordinary form. Upon the death of Henry Godden, his widow became his administratrix properly, and assignee of the lease. She died. Her son, G. S. Heales, the father of

(1) 9 Q. B. 365.

the defendant, without taking out letters of administration, took possession of the lease. He thereby not only became executor de son tort of G. S. Heales; but he took possession of the property under this demise, and so became executor de son tort of the term. Upon his death G. S. Heales left a widow. He made no will, and no administration was taken out to his effects. The defendant, his son, let the premises, received the rent, and paid the ground-rent, handing over the surplus to his mother, whom he assumed to be entitled to it. If in doing this the defendant was acting as the agent of his mother, she would be executor de son tort, and for the time assignee of the term, or at any rate she would have been estopped from denying that she was so: but the defendant could not be dealt with as assignee, provided he had not interfered by taking possession of the term *as his own.* But, even during the life-time of his mother, there was evidence which would have justified a jury in finding that he acted, not as agent of his mother, but on his own behalf, notwithstanding that he chose to pay over the balance of the rent to his mother; because there was evidence that he let the premises in his own name to sub-tenants. It is at all events doubtful whether the mere fact that his mother was living would have prevented a jury from finding that he was assignee of the term. There was strong evidence of his having done more than was done by the defendant in *Paull* v. *Simpson.* (1) But, however that may be, after his mother's death, he, intending to act for himself, continued to receive the rents and to pay the ground-rent. It is impossible that he can after that deny that he held as tenant under the terms of the lease. It is said that he cannot be chargeable as executor de son tort, because both his father and mother were executor and executrix de son tort. But, if a mere stranger acting as the defendant did would be chargeable as assignee, that circumstance could not prevent him from being liable in the same way. I agree, therefore that the plaintiffs are entitled to judgment.

DENMAN, J. I am of the same opinion. It is, I think, unnecessary (though I entertain no doubt on the subject) to decide that the defendant was executor de son tort, strictly speaking. At all events, the facts stated in the special case shew that he is assignee of the term, and estopped from denying that he held under the lease. In *Buckworth* v. *Simpson* (1), A. demised to B. certain lands and premises for one year certain, and thence from year to year so long as the parties should think proper, with power to determine the term on giving a certain notice to quit, and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy, and paid rent. And it was held that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their part to abide by the terms of the original contract. The same principle is applicable here. All the cases as to charging parties in the character of executor de son tort are considered in the last edition of Williams on Executors, in the notes at p. 264 and other pages. It seems to turn upon the question whether the party has interfered as the agent of one who afterwards turns out to be the rightful executor. There is nothing there which would aid the present defendant. I think he was clearly liable to be charged as assignee, and therefore that the plaintiffs are entitled to judgment.

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(1) 9 Q. B. 365.

HONYMAN, J. It is not necessary to decide whether or not the defendant was executor de son tort. He is charged here as assignee of the term: and, looking at the facts stated in the special case, if I were sitting as a juryman, I must confess I should incline to infer that there had been an actual assignment to him. There is nothing in the case of *Paull* v. *Simpson* (2) that is at all opposed to that notion.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Thomas.*
Attorney for defendant: *L. J. Dale.*

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(1) 1 C. M. & R. 834.

(2) 9 Q. B. 365.

RE STEPHENS.

1874
Jan. 28.

Practice—Taking Documents off the File.

Certain documents relating to the shipment of goods at Bombay having been returned annexed to a commission issued to that place for the purpose of taking evidence in an action brought in this Court upon a policy of insurance on part of the goods so shipped, and a mandamus having issued for the examination of witnesses in an action brought in the Court of Exchequer upon a policy on other goods alleged to have been shipped on board the same vessel, on the execution of which writ the same documents would be required for the purpose of identification or otherwise,—application was made to this Court for leave to take them from the office for the purpose of their being sent out to Bombay with the mandamus.

The Court refused the application, inasmuch as the case in this Court was sub judice, and the documents in question might still be required here; but they suggested an application to the Court of Exchequer for leave to annex to the mandamus office or photographic copies.

An action was brought in the Court of Exchequer by Stephens and others against The Imperial Royal Azienda Assicuratrice of Trieste upon a policy of insurance for 2000*l.* on 250 bales of cotton alleged to have been shipped at Bombay in May, 1870, on board the *Aurora,* for Liverpool; the plaintiffs claiming as for a total loss. Issue was joined in that action on the 7th of December, 1871,—one of the issues being whether the cotton was shipped or not. Other cotton besides the above-mentioned 250 bales was also alleged to have been shipped by the *Aurora,* which was insured by Messrs. Irving, Ebsworth, & Co., by a policy with the Alliance Marine Insurance Co. of London, an action upon which policy is still pending in this Court. For the purpose of obtaining evidence in the action of *Ebsworth* v. *Alliance Marine Insurance Co.* as to the shipment of the cotton, a commission was issued to Bombay, and was returned with the evidence taken thereunder, and having annexed to the commission the various shipping documents and Custom House pass-note and other books and documents relating to such shipment. These books, documents, and pass-note related to and contained entries and matters relating to the 250 bales of cotton in question in the action of *Stephens* v. *Imperial Royal Azienda Assicuratrice of Trieste,* in the Exchequer, as well as to the cotton insured by Irving, Ebsworth, & Co.

The case of *Ebsworth* v. *Alliance Marine Insurance Co.* is now pending in the Exchequer Chamber, and all the documents above mentioned are now in the custody of this Court, awaiting the decision of the Court of error. (1)

On the 16th of January, 1872, the Court of Exchequer made an order in the case of *Stephens* v. *Imperial Royal Azienda Assicuratrice of Trieste* that a mandamus should issue directed to the Chief Justice and other justices of the High Court of Judicature of Bombay, directing them to hold a Court for the examination vivâ voce, on oath or affirmation, of witnesses on behalf of the plaintiffs and the defendants respectively in that action; and the trial of the action was postponed until the return of the writ.

Upon an affidavit of the above facts, and also alleging that, for the purpose of giving due effect to the above order, and for the purpose of obtaining evidence as to the shipment of the 250 bales of cotton on board the *Aurora*, and also with a view of refreshing the memory of the witnesses to be examined under such order, it would be necessary to place in the hands of the witnesses the several shipping documents, Custom House pass-note, and other books and documents relating to the shipment of the cotton on board the *Aurora*, so filed in this Court as aforesaid,

M'Leod moved for a rule or order that the documents referred to might be taken off the files of this Court, and sent out to Bombay with the mandamus, otherwise the proceedings under the writ would be abortive. Notice of the application had been given to all the parties interested.

[KEATING, J. The difficulty will be that the documents when returned will be returned with the mandamus to the Court of Exchequer.

LORD COLERIDGE, C.J., suggested that an application might be made to the Court of Exchequer to allow office-copies of the documents to be sent out.]

It may be that it may be necessary to identify the handwriting to some of the documents.

[LORD COLERIDGE, C.J. That difficulty might be got over by taking photographic copies,—a thing which is by no means uncommon at the present day.]

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(1) See Law Rep. 8 C. P. 596.

Copies might be deposited in the office of this Court.

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RE STEPHENS.

LORD COLERIDGE, C.J. The documents might possibly be wanted in the action in this Court. If the Court of Exchequer should make any difficulty in adopting our suggestion, you may apply to us again. I do not like to make a precedent which might lead to inconvenience on future occasions.

The rest of the Court concurring, *Rule refused.*

Attorneys for plaintiffs: *Westall, Roberts, & Barlow.*
Attorneys for defendants: *Waltons, Bubb, & Walton.*

OULTON *v.* RADCLIFFE.

Jan. 31.

Court of Common Pleas, Lancaster—Service of Writ out of the Jurisdiction—Appearance—Waiver.

Loff Cas
178
9 Q.B.D. 360

A writ was issued out of the Court of Common Pleas at Lancaster, which is a superior Court, for a cause of action cognizable by that Court, but which arose beyond its jurisdiction. The service was upon the defendant's attorney beyond the jurisdiction; and he gave an undertaking to appear and did appear for the defendant:—

Held, that the irregularity in the service was cured by the appearance.

THIS was an action brought for the hire of sacks. The whole cause of action arose and both parties resided, the plaintiff in Northampton and the defendant in Shropshire, out of the jurisdiction of the Court of Common Pleas at Lancaster. The writ of summons was issued out of that Court, and was sent to the defendant's attorney at Stone, in Staffordshire, which is also beyond the jurisdiction, and he gave an undertaking to appear and did appear to it.

A summons was obtained by the defendant to set aside the writ and subsequent proceedings on the ground that the service of the writ was a nullity, and that the Court of Common Pleas at Lancaster had no jurisdiction to issue the writ or to entertain the suit. Martin, B., at chambers, referred the matter to the Court.

Jan. 20. *Gully* obtained a rule nisi in the terms of the summons. He referred to 4 & 5 Wm. 4, c. 62, and 32 & 33 Vict. c. 37,

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relating to the practice and proceedings of the Court of Common Pleas at Lancaster, and to the Common Law Procedure Acts, 1852 (15 & 16 Vict. c. 76), s. 229, 1854 (17 & 18 Vict. c. 125), s. 100, and 1860 (23 & 24 Vict. c. 126), s. 40, and to the cases of *Morgan* v. *Johnson* (1) and *Roberts* v. *Spurr*. (2)

Jan. 31. *R. G. Williams* shewed cause. This was at most a mere irregularity. The Court of Common Pleas at Lancaster has jurisdiction over all causes of action, whether they arise within the county of Lancaster or not; it is enough if the defendant happens to be within the jurisdiction, and is served within it. In Bacon's Abridgment, *Courts Palatinate,* it is said: "The palatinate Courts are superior Courts of record which exercise a jurisdiction within their own precincts in as ample a manner as the Courts of Westminster, into which the King's ordinary writs do not run." And in the margin, referring to 4 Inst. 204, 213,—" Is a general Court for all subjects of the palatinate, and not merely for causes arising within the palatinate; and therefore, if a debtor goes from a foreign into a palatinate jurisdiction, his obligations go along with him as much as if he removed from one kingdom to another; and he may be sued there though the cause of action arose not within such particular jurisdiction." Gilbert's History of the Common Pleas, p. 189, is to the same effect. In *Peacock* v. *Bell* (3) the rule for jurisdiction was laid down, viz. "that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged." Prior to the passing of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 18, 19, a debtor resident abroad was not amenable to the process of the Courts at Westminster; but, if he were served with process abroad, and chose to appear to it, all objection to the process was waived. Those provisions were enacted for the purpose of rendering amenable to our process persons who before were not so: see the cases referred to in Day's Common Law Procedure Acts, 4th ed. p. 50 et seq. The palatinate Court is in the same position as the Courts at

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(1) 1 H. Bl. 628.

(2) 3 Dowl. 551.

(3) Notes to 1 Wms. Saund. 96.

Westminster in that respect. If the party be served out of the jurisdiction, the cause being one over which the palatinate Court has a general jurisdiction, and he chooses to appear, all irregularity is waived. It is laid down generally in all the books of practice that appearance cures any irregularity in the process or service.

[BRETT, J. Suppose the cause of action were local, and both parties resided out of the jurisdiction, would the want of jurisdiction be supplied by appearance? Or, suppose the cause of action arose between two foreigners abroad, irrespective of any statute, and the debtor was served abroad, and he chose to appear, would such appearance give jurisdiction?]

It is enough if you get the party within the jurisdiction, the cause being one which is cognizable by the local jurisdiction. In *Forbes* v. *Smith* (1), a British subject residing in France was there served with a writ of summons in the form prescribed by s. 18 of the Common Law Procedure Act, 1852. The writ was specially indorsed with a claim in respect of promissory notes made abroad. The defendant appeared to the writ, and after declaration found that the cause of action did not arise within the jurisdiction of the Court, and was not in respect of a breach of a contract made within the jurisdiction, whereupon he applied to set aside the writ and proceedings under it; and it was held that there was no irregularity in the writ itself, and that the defendant by appearing had given the Court jurisdiction. Martin, B., there says (2): "When a person is served with such a writ, one of two courses is open to him: he may either appear or not. If he does not appear, no further proceedings can be taken on the writ, except upon an affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction. But, if he does appear, the question becomes, whether the Court has jurisdiction in the cause. It is argued that until declaration the defendant has no means of knowing the cause of action. But he might have obtained a summons for particulars under the 20th of Reg. Gen. H. T. 1853, which expressly says that an order for particulars may be made before appearance. Instead of doing so, he appears to the action. I think that, even if a

(1) 10 Ex. 717; 24 L. J. (Ex.) 167. (2) 10 Ex. at p. 723.

1 Jur N.S. 183.

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foreigner came before the Court and stated that, being in ignorance what course to pursue, he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance."

[KEATING, J. That case was acted upon in a subsequent case of *Staniforth* v. *Richmond.* (1)]

Schibsby v. *Westenholz* (2) was also referred to.

Gully, in support of the rule. By 4 & 5 Wm. 4, c. 62, s. 1, the writ must be served in the county palatine, and "not elsewhere;" and the Common Law Procedure Acts, 1852 (s. 229), 1854 (s. 100), and 1860 (s. 40), which extend some of the provisions of those Acts (and, amongst others, ss. 18 and 19 of the Act of 1852, relating to the issuing and service of writs elsewhere than within the jurisdiction,) to the courts of the counties palatine, contain the same limit of those jurisdictions. Most of the cases have arisen upon s. 18 of the Common Law Procedure Act, 1852. Under that section, all that is necessary to make the writ and service regular is, that the defendant is a British subject, and that the cause of action arose within the jurisdiction of the Court, or that it was in respect of the breach of a contract made within the jurisdiction. In *Forbes* v. *Smith* (3), the writ was not a nullity when sued out and served: both writ and service appeared to be regular; and it was only when the declaration was delivered that the defendant ascertained that the cause of action did not arise within the jurisdiction of the Court; and then it was too late to move to set aside the service. Here, it is conceded that, to give jurisdiction, the writ must be served within the limits of the palatinate.

[BRETT, J. Where the Court has a general jurisdiction over the subject-matter, the parties being before it, can it not look behind the writ?]

If the writ or the service be an absolute nullity, appearance cannot cure it. In *Morgan* v. *Johnson* (4), it was held that service of a notice of declaration on a Sunday was bad, though the defendant accepted it knowing it to be irregular; the Court saying,—"The defendant could not by his acceptance waive the irregularity."

1 Jur NS. 388.

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(1) 13 W. R. 724.

(2) Law Rep. 6 Q. B. 155.

(3) 10 Ex. 717; 24 L. J. (Ex.) 167.

(4) 1 H. Bl. 628.

[BRETT, J. Because the service of process on a Sunday is by 29 Car. 2, c. 7, s. 6, void to all intents and purposes, and incapable of being made good by any waiver of the party: *Taylor v. Phillips.* (1)]

The 4 & 5 Wm, 4, c. 62, s. 1, expressly provides that the writ shall be served "in the county palatine, and not elsewhere." The service elsewhere is therefore void to all intents and purposes.

[KEATING, J. Suppose the defendant, not having been served at all, but having heard of the writ, went into the county of Lancaster and entered an appearance,—could he afterwards have applied to set aside the writ?]

No waiver can give validity to a nullity. In *Roberts* v. *Spurr* (2) it was held that an interlocutory judgment signed without an appearance entered was a nullity, and could not be waived. Williams, J., in giving judgment, refers to *Garratt* v. *Hooper* (3), where Taunton, J., says,—"There is this difference between an irregularity and a nullity: an irregularity may be waived, but a nullity cannot. It is not in the power of the party to waive it; as the Act of Parliament (4) declares it to be a nullity, the Court is so to judge of it." And see Com. Dig. *Franchises* (D. 3).

KEATING, J. This a rule to set aside proceedings in the Court of Common Pleas at Lancaster on the ground of want of jurisdiction. The facts are these:—The writ was sued out of the palatinate Court in respect of a cause of action not arising within the jurisdiction of that Court, and sent to the defendant's attorney, who also resided out of the jurisdiction. The latter, being duly authorized to act for the defendant, accepted the service, and entered an appearance thereto. And the question is, whether the fact of the writ having been served out of the jurisdiction makes the subsequent proceedings void; in other words, whether the appearance of the defendant by his attorney, though the service was such that he was not bound to appear, gives the palatinate Court jurisdiction. I am of opinion that the appearance did waive the objection to the jurisdiction. It appears from the authorities which have been cited by Mr. Williams that the Court of Common Pleas at Lancaster is

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(1) 3 East, 155.

(2) 3 Dowl. 551.

(3) 1 Dowl. 28.

(4) 4 & 5 Ann. c. 16, s. 11.

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a superior Court: and in *Peacock* v. *Bell* (1) it is laid down in the most direct terms "that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged." The Court of Common Pleas at Lancaster, therefore, is put exactly on the same footing as a superior Court. This question came to be considered in the Court of Exchequer in *Forbes* v. *Smith* (2), under s. 18 of the Common Law Procedure Act, 1852. A British subject residing abroad was served with a writ indorsed with a claim in respect of promissory notes made abroad: the defendant appeared; and it was held that the appearance waived the irregularity in the service. Martin, B., in his judgment, anticipates the very distinction which has been suggested here. "I think," he says, "that, even if a foreigner came before the Court and stated that, being in ignorance what course to pursue, he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance." Here the writ was duly issued: and what in effect happens is this: the defendant (through his attorney) having heard that a writ has issued, says to the plaintiff's attorney, "You need not take the trouble to serve me: I will appear:" and he does enter an appearance. I think the rule should be discharged.

BRETT, J. I apprehend that every Court, whether superior or inferior, has jurisdiction over all matters that are properly brought before it, and over all persons who are properly brought before it. Here, the action is brought in the Court of Common Pleas at Lancaster. The objection amounts in effect to this, that the Court had no jurisdiction over either the subject-matter of the action or over the person of the defendant. It was said in the first place that the Court had no jurisdiction over the subject-matter, inasmuch as it did not arise within the county. If this had been an inferior Court without parliamentary jurisdiction, I should have thought that objection well founded. But *Peacock* v. *Bell* (1), supported by

(1) Notes to 1 Wms. Saund. 96.

(2) 10 Ex. 717; 24 L. J. (Ex.) 167.

1 Jur NS 383

Bac. Abr. *Courts Palatinate*, and Gilbert's History of the Common Pleas, 189, is an authority for saying that the palatinate Court is a superior Court, and has jurisdiction over matters arising elsewhere than within the county. If its jurisdiction had been confined to the limits of the county, I should have thought that that would have made it a Court of inferior jurisdiction. Then it is said that the Court had no jurisdiction over the person of the defendant here, because the writ was not served at all, or, if served, was served out of the jurisdiction of the Court. But the case of *Forbes* v. *Smith* (1) decides that jurisdiction over the person does not depend upon the service of the writ. It is true that a party residing out of the jurisdiction cannot be compelled to come before the Court without service of the writ, or that which amounts to service: that would be contrary to natural justice. But, however irregular a writ may be, no objection can be taken to it on that ground after the defendant has chosen to appear to it. I must not be understood as going the length of saying (indeed, my impression is the other way,) that, if the Court had no jurisdiction over the subject-matter of the action at all, the defendant's consent by appearing would give jurisdiction. I think the rule must be discharged.

DENMAN, J. I am of the same opinion. The case of *Morgan* v. *Johnson* (2), which was so much relied on by Mr. Gully, is altogether inapplicable. The judgment there proceeded upon the ground that service on a Sunday is altogether illegal, and not a mere irregularity. Mr. Gully also relies on 4 & 5 Wm. 4, c. 62, s. 1, which enacts that writs sued out of the palatinate Court shall be served in the county palatine, and not elsewhere. But, read by the light of *Forbes* v. *Smith* (1), that does not mean that a service elsewhere shall be such a nullity as to be incapable of waiver. By his subsequent appearance, the defendant admits the jurisdiction. Actual service of the writ is not essential. If the defendant appears, that gives the Court jurisdiction to proceed, provided the subject-matter of the action is one over which the Court has jurisdiction.

(1) 10 Ex. 717; 24 L. J. (Ex.) 167.

1 Jur NS 383.

(2) 1 H. Bl. 628.

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HONYMAN, J. I am of the same opinion. The palatinate Court having jurisdiction over the subject-matter, all that 4 & 5 Wm. 4, c. 62, s. 1, does, is, to require service of the writ to be made within the limits of the county. But, if the defendant chooses to waive it, or to accept service out of the jurisdiction, and appears to the writ, I am at a loss to see what irregularity there can be in the subsequent proceedings.

Rule discharged.

Attorneys for plaintiff: *Neal & Philpott, for Evans & Lockett, Liverpool.*

Attorneys for defendant: *Chesters, Urquhart, Bushby, & Mayhew, for G. W. Hodgkinson, Stone, Staffordshire.*

Jan. 30.

PHILLIPS *v.* MILLER AND ANOTHER.

Vendor and Purchaser—Sale of Real Property—Incumbrances—Terms of existing Tenancies, Notice of.

Part of an estate consisted of three farms in Hampshire, and in that county valuations between outgoing and incoming tenants for hay, straw, and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements from year to year, according to the custom of Hampshire. In April, 1868, the defendants, who were devisees of the estates on trust for sale, gave notice to the tenants to quit at Michaelmas, 1869, but the tenants alleged that they had been promised leases by the devisor, and ultimately it was agreed that if they would give up possession according to the notices, the half year's rent due at Michaelmas, 1868, should be remitted to them, and they should be entitled at the termination of their tenancies to be paid for hay, &c., at "market value."

In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents; and certain incumbrances, subject to which the sale was made, were specified, viz. land tax and tithe rent-charge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale nor should any compensation be allowed, and that the rents or possession should be received or retained, and the outgoings discharged by the vendors up to the 29th of September, and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract for sale, which was written on

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a copy of the above-mentioned particulars and conditions, described the property purchased as the property mentioned in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time the plaintiff bought he had no knowledge of the above-mentioned agreements with the tenants.

Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay the tenants market instead of fodder value for the hay, straw, and manure.

The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and now sought to recover the difference between that and fodder value from the vendors:—

Held, that upon the true construction of the contract of sale there was nothing to shew that the farms were to be conveyed free from the claim of the tenants to be paid at market value; but that the contract was to convey, subject to the existing tenancies, of which the agreements to pay market value formed terms, and that upon the authority of *James* v. *Lichfield* (Law Rep. 9 Eq. 51), notice to the plaintiff of the tenancies was notice to him of all the terms of such tenancies, and consequently that the action was not maintainable.

Revd in Ex Ch LR 10 CP. 420

SPECIAL case stated in an action by the purchaser against the vendors of real property. The facts sufficiently appear from the judgment.

Channell, for the plaintiff. (1) The question depends upon the interpretation of the contract between the parties. It is contended that the contract is to convey free from all incumbrances not disclosed to the purchaser by the contract. It is a contract to convey, subject to such rights as the tenants had up to Michaelmas, 1869, free from any right on their part to occupy after that time, or from any right to be paid for not occupying. The agreements made with the tenants form no part of the terms of their tenancies. They were mere collateral agreements in consideration of which they abandoned their claim to leases. If that be so, the doctrine that notice of a tenancy is notice of all the terms of it, does not apply. If the term as to "market value" form part of the tenancies, then the term as to remission of rent also forms part of it, and the tenancies were erroneously described in the particulars. The contract was a contract to sell with possession from Michaelmas, 1869, and the purchaser ought not to have to bear the expense which the vendors had to incur in order to put them in a position to perform their contract. What the vendors really did was to pur-

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(1) As will be seen from the judgment, the case was twice argued, but it has been thought unnecessary to give more than the second argument.

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chase from the tenants the right of selling with possession from Michaelmas, 1869. The effect of what the vendors claim would be to make the purchaser pay part of the purchase-money twice over. The contract is for the purchase of an unincumbered freehold with clear right of possession, except so far as qualified by the tenancies as described in the particulars. The only qualification is in respect of the rights of the tenants in respect of their tenancies up to Michaelmas, 1869. Their right under such tenancies was to "fodder value" not "market value."

[KEATING, J. Suppose the tenants had originally held on the terms that they were to be paid market value?]

Then it would be contended that according to the doctrines of equity there ought to be express notice of an unusual term in the tenancy; the actual description not only gave no such notice, but misdescribed the tenancy, because it mentioned the original rents, whereas a portion had been remitted: *Dimmock* v. *Hallett.* (1)

[COLERIDGE, C.J. In my view there had been no alteration of the rents, but merely the allowance of a certain sum in consideration of their giving up their claims.]

It will be contended that notice of the tenancy is notice of all the terms. If the plaintiff's construction of the contract be correct, that doctrine has no application. It has never been held in equity that notice can import a parol variation into a written contract. The cases in equity as to notice merely establish that a person taking an estate with notice of an equity attaching to it will be bound to the person entitled to the equity. This doctrine applies between the purchaser and a third party, but has no relation to cases between vendor and purchaser. In such a case as *Daniels* v. *Davison* (2), where it was held that notice of a person being in occupation of land was notice of all his rights, even of an agreement for sale to him of the fee simple, could it be contended that Davison would have no remedy as against his vendor? Notice that the vendor cannot carry out his contract does not affect the purchaser's right to have the contract carried out. Even assuming that the purchaser is to be taken to have known constructively of these agreements with the tenants, that does not affect his right to have the terms of the contract carried out.

(1) Law Rep. 2 Ch. 21. 12 Jur NS 953 (2) 16 Ves. 253.

[COLERIDGE, C.J. But the fact of knowledge of an incumbrance might affect the construction of the contract. "All incumbrances" must obviously mean all incumbrances except those that by the terms of the contract the purchaser is to discharge.

KEATING, J. It is essential to your argument to shew that the contract was to sell, subject to tenancies of which the terms were "fodder value."]

It is contended that if the plaintiff had really known, he would have been entitled to assume, under the circumstances of this case, that the vendors meant to discharge this obligation. *James* v. *Lichfield* (1), where it was held, as between vendor and purchaser, that notice of a tenancy was notice of the terms of it, though unusual, is distinguishable from this case. That was the case of an application by a purchaser against the vendor for specific performance with compensation, a case which is subject to different considerations. In such cases the Court of Equity, to some extent, will make a new contract; that is to say, it will enforce that which, though not strictly according to the terms of the contract, is in substance a performance of it. The purchaser can force the vendor to convey what he never strictly contracted to convey, but what he has got, subject to compensation for the difference between it and the contract. It may well be that, where a purchaser comes to ask for this, the Court will say that when he had notice, and neglected to inquire further, he cannot claim specific performance and compensation too.

Secondly: By the arrangement between the parties, the plaintiff's having completed and satisfied the tenants' claims was without prejudice, and if the defendants were really bound to pay, then the plaintiff can recover the sums he has paid as money paid. The Court of Chancery would not have decreed specific performance against the plaintiff, at least not without compensation, on the ground that there ought to have been a more distinct notice of the peculiar terms of those tenancies; consequently the plaintiff was not bound to complete nor to pay the tenants: *Martin* v. *Cotter* (2); *Hughes* v. *Jones* (3); *Barnett* v. *Wheeler* (4); *Seton* v. *Slade*. (5)

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(1) Law Rep. 9 Eq. 51.

(2) 3 Jones & Lat. 496.

(3) 3 De G. F. & J. 307.

(4) 7 M. & W. 364.

(5) 2 White & Tudor's L. C. 429.

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Field, Q.C. (with him *C. S. C. Bowen*), for the defendants, was not called upon, the Court intimating that their opinion was in favour of the defendants, but that they would take time to prepare their judgment.

Cur. adv. vult.

Jan. 30, 1874. The judgment of the Court (Lord Coleridge, C.J., Keating, J., Denman, J., and Honyman, J.,) was delivered by

LORD COLERIDGE, C.J. This was a special case stated in an action brought by the plaintiff to recover compensation for the loss he alleged himself to have sustained by reason of claims made upon him by three persons who were tenants of parts of an estate purchased by him from the defendants.

The first count was based upon the breach of an alleged contract to convey the premises, free from such incumbrances and claims, as specified in the contract and particulars of sale; the second on an alleged contract to convey the premises free from any right of the tenants to be paid for hay, &c., at a higher rate than fodder value; the third on the breach of a contract to settle by arbitration the question of the plaintiff's right to be indemnified by the defendants against any loss he might sustain by the difference between market and fodder value; and the declaration also contained the common money counts.

The parties afterwards agreed to state a special case for the opinion of the Court upon the first, second, and fourth counts, the third count not being included in the case; but the defendants were not to set up as an answer to the plaintiff's claim the fact that no award had been made,—the Court to have power to draw inferences of fact, and to amend the pleadings, if necessary.

The material facts set forth in the special case were as follows:—

The defendants were the devisees for sale under the will of Sir Charles Miller of the Wishanger estate, in the counties of Southampton and Surrey. Part of this estate consisted of three farms, one of which was held by Mr. Parker, and consisted of 553 acres in Hampshire and 45 acres in Surrey. The other two farms were held by Mr. Bettesworth and Miss Knight, and were wholly in Hampshire. In Hampshire it is usual, in the absence of special agreement, for valuations between outgoing and incoming tenants to be made at fodder value; while in Surrey they are made at market value, being a higher value than fodder value.

At the death of Sir Charles Miller, the three tenants held under verbal agreements as tenants from year to year from Michaelmas, and on the terms of being paid valuations at fodder value only, and in all other respects according to the custom of Hampshire.

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In April, 1868, the defendants gave the three tenants notice to quit at Michaelmas, 1869; but the tenants asserted that Sir C. Miller before his death had promised them leases; and ultimately, on the 11th of May, 1868, agreements were entered into between the defendants and the three tenants, by which, after reciting the alleged agreement to grant leases, the tenants agreed to give up possession at Michaelmas, 1869, and the defendants agreed to allow or remit to the tenants the half-year's rent payable at Michaelmas, 1868, and also to pay to them at Michaelmas, 1868, a sum of money, and also to pay or allow to them at Michaelmas, 1869, or at the termination of their tenancies, for all the hay, straw, and manure produced on the farms during the preceding year, at market value.

In June, 1868, the Wishanger estate was put up for sale by auction. In the particulars and conditions of sale, the three farms were described as follows:—

"Farm A. in the occupation of Mr. Parker till Michaelmas, 1869, at the low annual rent of 580*l.*

"Farm B. in the occupation of Miss Knight till Michaelmas, 1869, at a rent of 80*l.* per annum.

"Farm C. in the occupation of Mr. Betteswortl till Michaelmas, 1869, at the very low annual apportioned rent of 93*l.* 15*s.*"

The particulars further specified *certain incumbrances* subject to which the estate was sold (viz. land-tax and tithe rent-charge), and stated that the property was sold subject to all rights of way or other easements that might exist; but there was no express mention in any part of the particulars of the agreement of the 11th of May, 1868.

The ninth, tenth, and eleventh conditions of sale were as follows:—

"Ninth. The *numbers and quantities* of the property are taken

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from the tithe rent-charge apportionments and maps of the parishes of Headley and Trensham, and the inclosure maps for the said parishes; and the property shall be taken to be correctly described *as to quantity and otherwise,* and is sold subject to all rents (if any), rights of way and water, and other easements charged or subsisting thereon. And if any error, mis-statement, or omission in the particulars or these conditions shall be discovered, the same shall not annul the sale, *nor shall any compensation be allowed* or given by the vendors or purchaser in respect thereof.

"Tenth. The purchaser shall pay the remainder of his purchase-money and the amount of the valuations determined or to be determined as provided by the particulars of the timber and timber-like trees, tellers, pollards, saplings, underwood, plantations, fixtures, implements, and other matters mentioned in the particulars as having been or to be valued, on the 29th day of September next, at the office, No. 4, South Square, Gray's Inn, Middlesex, of Messrs. Ranken, Ford, & Longbourne, the vendors' solicitors, to the vendors or as they shall in writing direct; and upon such payment the vendors and all other necessary parties will execute a proper assurance of the property to the purchaser, but such assurance and every other assurance and act, if any, which shall be required by the purchaser for getting in, surrendering, or releasing any outstanding estate, right, title, or interest, or for perfecting the vendors' title, or for any other purpose, shall be prepared, made, and done by and at the expense of the purchaser; and every such assurance shall be left not less than ten days before the said 29th day of September next, at the office aforesaid. The vendors are the trustees and acting executors of the above-mentioned will of Sir Charles Hayes Miller selling under a power of sale; and the concurrence of the persons beneficially interested shall not be required. And *the purchaser shall not be entitled to any other covenant than several covenants by the vendors that they respectively have not incumbered.*

"Eleventh. The rents or possession will be received or retained, and the outgoings discharged by the vendors up to the said 29*th day of September* next; and as from that day *the outgoings shall be discharged* and the rents or possession taken by the purchaser; and such rents and outgoings shall, if necessary, be apportioned between the vendors and the purchasers for the purposes of this condition. If from any cause whatever the purchase shall not be completed on the 29th day of September next, the purchaser shall pay interest on the remainder of his purchase-money and on the amount of all the valuations above referred to at the rate of 5*l.* per cent. per annum from that day until the purchase shall be completed, and shall not be entitled to any compensation for the vendors' delay or otherwise."

At the auction, the auctioneer read out a memorandum written at the foot of his copy of the particulars, which stated that the three tenants were entitled to be paid for their hay, straw, and manure at market price; but this memorandum was not copied on the copies circulated among bidders.

The property was bought in at this sale; and on the 18th of July, 1868, was purchased by the plaintiff by private contract, of which the following is a copy:—

"I, John Hawkins Phillips, of 6, Great St. Helens, hereby acknowledge that I have bought the *property mentioned* in the foregoing particulars, subject to the foregoing conditions, at the price of 47,000*l.*, including the timber, plantations, fixtures, and machinery mentioned on page 12, and that I have paid the sum of 4700*l.* by way of deposit and in part payment of the said purchase-money to Messrs. Ranken & Co., and hereby agree to pay the remainder of the said purchase-money and complete the said purchase according to the aforesaid condition.

"for John Rouse Phillips,
"(signed) J. H. Phillips, purchaser.
"18th July, 1868.

"As agents for the vendors, George Miller and George Arthur Jervoise Scott, Esqrs., we ratify this sale, and we acknowledge the receipt of the said deposit of 4700*l.*, which we retain as stakeholders.

"(signed) Ranken & Co.
"18th July, 1868."

The foregoing contract was written on one of the printed copies of the particulars and conditions of sale already mentioned.

At the time the plaintiff bought he had no knowledge of the existence of the agreements of the 11th of May, 1868, or of the terms of the tenancies; but it was admitted by the plaintiff that the omission by the defendants from the particulars and conditions of sale of any express mention of the said agreements *was made under a bonâ fide belief that it was not necessary to mention them.*

The abstract of title did not allude to these agreements; and it was only when, on the 8th of September, 1868, the plaintiff inquired of the tenants whether their holdings were in accordance with the statements in the particulars, that he learned that the tenants claimed to be paid their valuations at market-price.

Correspondence ensued between the plaintiff and the defendants; and, on the 6th of January, 1869, the purchase was completed, subject to the following agreement:—

"The Wishanger Estate.

"In the matter of the purchase by Mr. John Rouse Phillips of this estate from Sir Charles Hayes Miller's trustees.

"In consideration of Mr. Phillips settling the above purchase this day, it is hereby mutually agreed by us the undersigned solicitors for the respective parties, that such settlement shall be *without prejudice to the claim made by Mr. Phillips for an indemnity* in consequence of the vendors having executed agreements to pay Mr. Parker, Mr. Bettesworth, and Miss Knight, three of the tenants of the estate, at the expiration of their tenancies, market price instead of fodder price for all hay, straw, and manure produced on their respective farms during the preceding year.

"The vendors *deny* that Mr. Phillips has any claim to an indemnity. *If Mr. Phillips sustains any loss owing to the difference between market price and fodder price, it is hereby agreed that the question of Mr. Phillips's right to be reimbursed such loss shall be submitted in writing to some Queen's Counsel to be agreed upon;* such writing to be settled by the counsel of the respective parties in case they differ about the same. And *the parties agree to be bound by the opinion of such Queen's Counsel.* And it is hereby agreed that, in the event of the opinion being in favour of Mr. Phillips, the vendors are to pay him any loss he may sustain. The costs of the reference to abide the award. Dated this 6th January, 1869.

"(Signed) "Wm. Ford,
"Solicitor for the vendors.
"C. D. J. Allen & Son,
"Solicitors for the purchaser."

The conveyance contained the usual covenant against incumbrances.

At the expiration of the tenancies, valuations were made between the plaintiff and the three tenants of the hay, straw, &c., and the amount assessed as the market value of the said hay, straw, &c., considerably exceeded the fodder value of the same. To these valuations the defendants were no parties. The plaintiff did not again let the three farms to new tenants, but divided them differently, and kept part of the land in hand. Shortly after the valuations, the tenants applied to the plaintiff for payment, and were paid by him, the defendants having previously repudiated their liability for any part of such valuations.

The case was argued before my Brothers Keating and Honyman in last Easter Term; and it has been re-argued during the present term, before my Brothers Keating and Denman and myself.

It was contended for the plaintiff, that, upon the true construction of the contract, he as purchaser had not got what the vendors contracted to sell him, and that he had therefore a right to succeed on purely legal grounds; and further that, if recourse were had to the doctrines of equity, notice in the particulars of sale that these farms were in the hands of tenants was not notice of the equities of such tenants, and that therefore, upon equitable grounds also, he was entitled to compensation. The case was argued for the plaintiff with abundant ingenuity by Mr. Channell; but we have arrived at a conclusion adverse to the plaintiff on both the legal and the equitable considerations arising in the case.

In order to succeed in his legal contention, the plaintiff must establish that the true construction of the conditions in the particulars of sale is, that the farms are to be conveyed free from all claim of the tenants to be paid, on the termination of their tenancies, at a higher rate than fodder value; and, further, that the arrangements with the tenants above set forth were not terms of the holdings or incident to them, but were in truth independent and collateral agreements as to the terms on which the tenancies should be determined, or claims and incumbrances other than any of those specified in the particulars and conditions, and which therefore the plaintiff, if he paid them, has a right in some form to recover from the vendors.

Neither proposition appears to us to be established. As to the first, the conditions and particulars of sale are no doubt part of the contract. But there are certainly no words in either particulars or conditions which directly limit the claims of the tenants to fodder value on the determination of their tenancies. Neither are there any words in the contract, nor any facts found in the case, from which it can be gathered even by reasonable, far less by necessary, inference that such a condition as is suggested is to be incorporated into the contract and read as part of it. As to the second, the arrangements with the tenants seem to us, upon the true view of them, not to be, as to the question of market value, collateral agreements nor unspecified claims and incumbrances, but really terms of the holdings of the tenants and incident to those holdings.

It was admitted, nor could it indeed be denied, that in point of fact the purchaser knew of the farms being in the occupation of tenants; and it was also admitted, nor could it be denied, that of these particular agreements with the tenants the purchaser had no knowledge in point of fact at the time of the purchase. Under these circumstances, it was contended that it was the duty of the vendors to have stated the particulars of these agreements, and that, if damage accrued to the purchaser in consequence of the non-fulfilment of this duty, he could recover it from the vendors on a count properly framed, and which the Court, under its power of amendment, might introduce.

It is perhaps unnecessary, after the opinion we have expressed upon the contract itself, to decide this question. But we are not satisfied that there is any such duty as that contended for. For certain purposes and between certain parties it is clear that notice of a tenancy is notice of a tenant's equities. In *Taylor* v. *Stib-*

bert (1), Lord Loughborough held that "whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have." Sir William Grant, in *Hall* v. *Smith* (2), and Lord Eldon in the case of *Daniels* v. *Davison* (3), both recognized and extended very far the doctrine of Lord Loughborough. These cases and the doctrine contained in them have been repeatedly recognized in later times, and may be considered as undoubted law. It has been argued, however, and with truth, that they are all cases, not between vendor and purchaser, but between a purchaser and a tenant of the vendor enforcing his equities against the purchaser, who was held bound by them even in very strong cases, where he had notice of the existence of a tenancy.

We find, however, that the same doctrine was applied by Lord Romilly in a case not appealed from and with which therefore it is to be presumed the parties were satisfied; though in that case they were purchaser and vendor. It is the case of *James* v. *Lichfield.* (4) That was a case of a suit by the purchaser against the vendor for specific performance *with compensation.* It raised, therefore, the same point as would arise in an action at law for damages occasioned by the breach of duty, if it were one, suggested in the present instance. Lord Romilly held that the doctrine of *Daniels* v. *Davison* (3) applied to a case between vendor and purchaser, and refused the compensation. "Whatever," said he, "puts a purchaser upon inquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest. This was adopted by the Lord Chancellor (Lord Eldon), who decided accordingly; and I am unable to see any ground for a technical, and, as it appears to me, an arbitrary distinction which should limit the application of the rule to one person, where the reason of the rule extends to all persons whatsoever."

On this state of the authorities, there would seem to be good ground for holding, if it were necessary, that there was here nothing to ground an action for damages against the vendors

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(1) 2 Ves. jun. 437.

(2) 14 Ves. 433.

(3) 16 Ves. 254; 17 Ves. 433.

(4) Law Rep. 9 Eq. 51.

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PHILLIPS v. MILLER.

for any breach of duty. Upon the whole case, therefore, we give judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *C. & J. Allen & Son.*
Attorneys for defendants: *Ranken, Ford, & Co.*

Jan. 14.

FREETH AND ANOTHER v. BURR.

Contract for Delivery of Goods in Parcels at different Times—Non-payment by Buyer for one Parcel—Refusal by Seller to deliver the Rest.

Port 59.
10 CP 19
23-5
4 Ch D 118
7 Ch D. 234
7 QBD 97
9 QBD 648
652, 657
658-66 6
676

The defendant contracted to sell to the plaintiffs 250 tons pig-iron at 56*s.* per ton, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel.

The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first 125 tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was ultimately paid:—

Held, that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach.

THE declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should sell and deliver to the plaintiffs and the plaintiffs should buy and accept of and from the defendant 250 tons of pig-iron, at 56*s.* per ton, to be delivered by the defendant to the plaintiffs; that the defendant delivered to the plaintiffs one half of the said 250 tons of pig-iron, and that all conditions were fulfilled, &c., to entitle the plaintiffs to have the agreement fulfilled by the defendant in respect of the matters the breach of which is hereinafter assigned, and to maintain this action: Breach, that the defendant did not nor would deliver to the plaintiffs the residue of the said 250 tons of pig-iron according to the agreement; whereby the plaintiffs had been deprived of the profits which would have accrued to them from the delivery of the same, and had been delayed and otherwise injured and damnified in their business, in which the defendant well knew they intended to use the said goods. Claim, 500*l.*

Pleas, 1. that the defendant did not agree, as alleged; 2. a denial of the alleged breach; 3. that, after the alleged promise, and before any breach thereof by the defendant, the plaintiffs exonerated and discharged the defendant from his promise and from the performance of the same; 4. that, after the making of the alleged contract, and before any breach thereof by him, the said contract was rescinded and abandoned by mutual assent.

Joinder of issue; and further replication to the third plea, that the plaintiffs were suing, not for a breach of the agreement therein admitted, and from the performance of which the defendant alleged that the plaintiffs exonerated and discharged the defendant, but for the breach of another and subsequent agreement by which the defendant agreed to sell and deliver the said iron to the plaintiffs.

There was a similar replication to the fourth plea.

Rejoinders to the second and third replications,—that no such agreement as the supposed other and subsequent agreements in those replications respectively mentioned were made,—that the defendant denied the alleged breaches of the said other and subsequent agreements and every of them, and said that he was not guilty thereof. Issue.

The cause was tried before Brett, J., at the sittings in London after last Hilary Term. The plaintiffs and the defendant were iron-merchants and manufacturers. In November, 1871, the plaintiffs agreed to buy of the defendant 250 tons of pig-iron, and on the 28th of that month bought and sold-notes were exchanged. The bought-note, signed by the plaintiffs, was as follows:—

"London, 28th November, 1871.

"Bought of Messrs. D. M. Burr & Co. two hundred and fifty tons of pig-iron, at fifty-six shillings per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash 14 days after delivery of each parcel."

The market was rising, and early in February the plaintiffs wrote to the defendant remonstrating with him for not having delivered any of the iron. About the 15th of that month 10½ tons were sent alongside the plaintiffs' wharf; and on the 20th the plaintiffs wrote to the defendant, as follows:—

"We are much surprised you should have sent such a paltry lot as 10 tons on account of contract for 250 tons which should have been delivered last December. We must request you will give us a definite time for delivery of at least 50 tons, which must be delivered at once, or we shall have again to buy against you."

On the 17th of May, 1872, the defendant wrote to the plaintiffs, as follows:—

"We are informed that the lighter which we sent with 30 tons Kentledge pig-iron to your wharf on the 10th instant is still lying there unloaded, and that this has arisen through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have, therefore, to intimate that we shall hold you liable for demurrage from and after 13th instant."

On the 18th the plaintiffs wrote to the defendant,—"In answer to yours of the 17th instant, your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?"

To this the defendant replied on the 21st,—"It is our intention to deliver remainder of pig-iron, and do not wish you to buy against us. We inclose invoice of last lot."

On the 29th of May, 126 tons in all having by that time been delivered, the defendant wrote to the plaintiffs,—"Would you kindly forward us cheque in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder."

The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim any loss which they might incur in case the defendant should fail to deliver the remainder of the iron contracted for, refused to pay for the 125 or 126 tons which had been delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for 250*l.*, being 2*l.* per ton on the 125 tons undelivered.

On the 12th of June, the defendant's attorneys wrote to the

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plaintiffs' attorney,—"We hardly think it necessary to refer to your clients' claim for 250*l.*, as it is purely hypothetical and could not possibly arise, as your clients by their own default have obliged our client to refuse to make any further delivery of iron. We must request your clients' immediate attention to the settlement of amount (352*l.* 15*s.* 10*d.*) mentioned in our letter of the 5th instant."

The plaintiffs paid ultimately (but not until after an action had been brought for it) for the first 125 tons of iron; and this action was brought against the defendant for the breach of his contract in refusing to deliver the second 125 tons.

On the part of the defendant, it was contended that the plaintiffs' refusal to pay for the first parcel of the iron amounted to an abandonment of the contract by them, and absolved the defendant from his obligation further to perform it on his part. *Hoare* v. *Rennie* (1) was relied on.

The learned judge ruled that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract to deliver the second 125 tons, and consequently that the plaintiffs were entitled to recover such damages as they had sustained from the non-delivery: and he directed a verdict to be entered for the plaintiffs for 148*l.* 16*s.*,—reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the refusal by the plaintiffs to pay for the iron delivered amounted to an abandonment of the contract.

Garth, Q.C., in Easter Term last, obtained a rule nisi accordingly.

Watkin Williams, Q.C., and *E. Clarke*, who appeared to shew cause, were stopped by the Court.

Garth, Q.C., and *Philbrick*, in support of the rule. The iron was not delivered according to the strict terms of the contract: but the correspondence shews that the time for delivery had been extended by mutual consent. The whole of the first parcel having been delivered, the defendant was entitled to payment for that parcel in fourteen days. Payment was demanded and refused.

(1) 5 H. & N. 19; 29 L. J. (Ex.) 19.

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The defendant had then a right, according to the principle laid down in *Hoare* v. *Rennie* (1), to treat that refusal as a breach, and to rescind the contract. In that case the plaintiffs had undertaken to deliver to the defendants 667 tons of iron, to be shipped from Sweden in the months of June, July, August, and September, and in about equal portions each month. In June the plaintiffs delivered twenty-one tons only; whereupon the defendants gave them notice that they would receive no more; and the Court of Exchequer held that they were justified in considering the contract as at an end. Pollock, C.B., in delivering judgment, said: "At the outset, the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for." So, here, the non-performance by the plaintiffs of the stipulation as to payment for the first parcel entitled the defendant to assume that they repudiated the contract. In *Withers* v. *Reynolds* (2), the refusal by the buyer to perform his part of the contract by paying for each load of straw as delivered, was held to entitle the seller to rescind the contract.

[DENMAN, J. There the plaintiff did acts and said things which amounted to a declaration on his part that he did not mean to perform the contract.]

Hoare v. *Rennie* (1) was distinctly recognized in *Bradford* v. *Williams* (3), though somewhat reflected upon in *Simpson* v. *Crippin.* (4)

[DENMAN, J., referred to *Jonasshon* v. *Young.* (5)]

LORD COLERIDGE, C.J. The question in this case arises upon a contract for the sale of iron entered into between the plaintiffs and the defendant on the 28th of November, 1871, in the following terms:—"Bought of Messrs. D. M. Burr & Co. 250 tons of pig-iron, at 56*s.* per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after delivery of each parcel." The material facts were these:—There was no delivery in the terms of the contract of either parcel of the iron. In point of fact, the delivery of the first 125 tons was by mutual arrangement delayed, and the last delivery of that parcel did not take place until the 12th of May, 1872. There was a correspondence between the parties, pressure by the purchasers for delivery, and excuses by the vendor for the non-delivery. That the former were anxious for the completion of the contract appears to be clear, as well from the tenor of the correspondence as from the fact that the market was rising. A few days after the full delivery of the first parcel, viz. on the 29th of May, 1872, the defendant demanded payment for the 125 tons, which the plaintiffs refused, claiming to set off damages for the defendant's breach of contract. The plaintiffs afterwards demanded delivery of the remaining 125 tons; and upon the defendant's refusal to comply with that demand this action was brought. The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears, viz. that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz. that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

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(1) 5 H. & N. 19; 29 L. J. (Ex.) 19.

(2) 2 B. & Ad. 882.

(3) Law Rep. 7 Ex. 259.

(4) Law Rep. 8 Q. B. 14.

(5) 4 B. & S. 296; 32 L. J. (Q.B.) 385. 10 Jur N.S. 43.

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That is the true principle on which *Hoare* v. *Rennie* (1) was decided, whether rightly or not upon the facts, I will not presume to say. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in *Jonasshon* v. *Young* (2) that that case may be supported. In *Withers* v. *Reynolds* (3) there was an express refusal by the plaintiff to perform the contract: and Patteson, J., says: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw: but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract." Wightman, J., certainly, and Crompton, J., by inference, in *Jonasshon* v. *Young* (4), both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my Brother Brett having ruled that the mere non-payment for the first portion of the iron contracted for, unattended by any other act on the part of the purchasers, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself), I am of opinion that his ruling was correct, and that the rule should be discharged.

KEATING, J. I entirely agree in the judgment pronounced by my Lord, and in the principle upon which he puts it. It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element. But, looking at all the circumstances of this case,—a rising market;

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(1) 5 H. & N. 19; 29 L. J. (Ex.) 19.

(2) 4 B. & S. 296; 32 L. J. (Q. B.) 385. 10 Jur NS 43

(3) 2 B. & Ad. 882.

(4) 4 B. & S. at p. 299.

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a failure on the part of the defendant to deliver the iron according to the terms of the contract; a series of deliveries in small quantities long after the times for delivery provided for by the contract; and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances, but with a requisition to the seller to fix a day for the delivery of a certain quantity;—I do not think they shew an intention on the part of the plaintiffs to abandon the contract. As upon the facts there appears to have been not only no absolute refusal to perform the contract by the plaintiffs, and, what is important, no evidence of inability on their part to perform it, I think the defendant had no right to treat the contract as rescinded and to refuse to deliver the remainder of the iron.

DENMAN, J. I am of the same opinion. The learned judge ruled that the mere refusal by the plaintiffs to pay for the portion of the iron delivered did not warrant the defendant in considering the contract as at an end; and he gave the defendant leave to move to enter a verdict or a nonsuit if the Court should think that ruling wrong. I am of opinion, upon the authority of *Withers* v. *Reynolds* (1), that the ruling was quite right. That case did not decide expressly that a mere failure of a single payment might not be evidence of a refusal to perform the contract. But, in the words of Patteson, J., the conduct of the plaintiff, coupled with the non-payment, amounted to an express refusal to perform the contract on his part. There was nothing of the sort here. After the way in which that case has been treated in subsequent authorities, I think we are bound to hold it to be a correct statement of the law, and to act upon it. Notwithstanding the plaintiffs' refusal to pay, the defendant was bound to go on and deliver the rest of the iron.

Rule discharged.

Attorneys for plaintiffs: *Payne & Nelson.*
Attorneys for defendant: *Evans & Co.*

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(1) 2 B. & Ad. 882.

1874
Jan. 12.

MEGRATH *v.* GRAY.
GRAY *v.* MEGRATH.

Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *ss.* 49, 50, 125, 126—*Effect of Release by Composition of One of Two Joint Debtors—Equitable Set-off—Evidence of Trust.*

10 Ex 12-9
20
10 Ch 211-2-4
— 311,
10 QB 412-3
414, 420
10 CP. 700
2 CPD. 324
23 Ch D 121
126
8 App Cas 609

All the three forms of proceeding in the case of an insolvent debtor, contained in the Bankruptcy Act, 1869, viz. by an adjudication of bankruptcy under s. 6, a liquidation by arrangement under s. 125, and a composition under s. 126, are (though different in form) "proceedings in bankruptcy." The general enactments, therefore, in ss. 49 and 50 apply to all discharges under the statute, and consequently an order of discharge in each of the three cases operates only to release the debtor in whose favour it is given, leaving his solvent co-debtor still liable to be sued separately by a joint creditor who has been a party to the release of the insolvent debtor.

Megrath sued Gray for 64*l.* 8*s.* 11*d.* for money lent, &c.; and Gray sued Megrath to recover a balance due in respect of two unpaid acceptances of Megrath and his former partner, one Highton, for 249*l.* 19*s.* 1*d.* and 167*l.* 7*s.* respectively, both of which became due in 1870.

In the first action, the defendant (Gray) pleaded an equitable set-off, alleging that, before the accruing of the causes of action, the plaintiff (Megrath) was indebted to him, that he (Gray) summoned a meeting of his creditors under s. 125 of the Bankruptcy Act, 1869, that a trustee was appointed, and that the trustee sold to him (Gray) the debt and claim due from the plaintiff to the trustee in respect of the aforesaid debt by the plaintiff to the defendant.

The equitable set-off of Gray in the first action constituted his claim in the second action, and arose under the following circumstances:—

Megrath and Highton dissolved partnership in May, 1870, the latter undertaking to pay all debts of the firm and to indemnify Megrath. Amongst the liabilities of the firm were the two bills the subject of set-off in the first action, which Megrath & Highton had given to Gray for goods sold, and which Gray had got discounted by the Adelphi Bank, Liverpool. These bills were dishonored, and Highton presented a petition for liquidation under s. 126 of the Bankruptcy Act, 1869, and by arrangement paid a composition of 10*s.* in the pound, and obtained his discharge. The Adelphi Bank received the composition.

Gray also filed a petition for liquidation under s. 125, and paid a composition of 9*s.* in the pound, and obtained his discharge, and (by agreement with the creditors) an assignment from the trustee of the debts mentioned in a schedule. The Adelphi Bank also received this composition. The schedule of debtors contained no reference to the Adelphi Bank or to the two bills in question: but evidence was received by the arbitrator who stated a special case in *Megrath* v. *Gray*, subject to objection, that Megrath's liability in respect of those bills was omitted from the schedule merely because they were considered by the trustee as of no value, and not with any intention of reserving to the trustee any right of action in respect of them. The bills were given up by the Adelphi Bank to Gray in January, 1872:—

Held,—upon the argument of a special case in the first action, and a rule to enter a verdict for the defendant in the second action—that, whether the right of action in respect of the unpaid balance of the two bills was at the commencement of the first action legally in Gray, or was legally in his trustee to hold in trust for him, Gray might equally maintain his equitable set-off; that the evidence objected to was properly admitted for the purpose of establishing a trust; and that the discharge of Highton did not release his co-debtor Megrath from his liability upon the bills.

THE action of *Megrath* v. *Gray* was for goods bargained and sold, money lent, &c. Claim, 70*l.*

The defendant pleaded, 1. never indebted; 2. payment before action; 3. a set-off for goods sold and delivered, money received, money lent, &c.; 4. for a plea upon equitable grounds, that, before the accruing of the causes of action in the declaration mentioned, the plaintiff was indebted to the defendant in an amount equal to the plaintiff's claim, for goods bargained and sold, &c., by the defendant to the plaintiff; and afterwards, and after the coming into operation of the Bankruptcy Act, 1869, and before this suit, the defendant summoned a general meeting of his creditors under and in pursuance of s. 125 of that Act, and thereupon such proceedings were had that a trustee of the property of the defendant was duly appointed within the meaning of the said 125th section, and the property of the defendant was duly vested in the said trustee, and before this suit the trustee, under and by virtue of the powers conferred upon him by the said Act, agreed to sell and transfer to the defendant, and did sell to the defendant, for a certain price then agreed upon between the trustee and the defendant, a certain parcel of the property so vested as aforesaid in the trustee, that is to say, the debt and claim due from the plaintiff to the trustee in respect of the aforesaid debt by the plaintiff to the defendant in respect of the said goods and in respect of the said accounts stated; that the plaintiff had not paid the debt, or any part thereof, either to the trustee or to the defendant, and the same was still due and unpaid, and before this suit everything had happened and been done necessary to make the said agreement between the defendant and the trustee valid and effectual, and to entitle the defendant to have the debt transferred to him by the trustee, and nothing

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had happened to disentitle him thereto; and the defendant was willing to set off the said debt against the plaintiff's claim. Issue.

The particulars of the defendant's set-off disclosed a claim for "money paid the Adelphi Bank in respect of two acceptances, one dated 9th of April, 1870, for 249*l.* 19*s.* 1*d.*, and the other for 167*l.* 7*s.*, dated April 23rd, 1870, given to the defendant by the plaintiff and one Highton, then the plaintiff's co-partner in trade."

This action was to recover 64*l.* 8*s.* 11*d.*, balance due for money lent and on accounts stated. The cause came on for trial before Brett, J., at the Liverpool Summer Assizes, 1872, when a verdict was entered for the plaintiff, subject to the opinion of the Court upon the following case:—

1. The plaintiff is a provision merchant, carrying on business at Liverpool. The defendant carries on the same line of business at the same place, under the style or firm of J. L. Gray & Co.

2. Previous to June, 1872, the plaintiff sold goods to the defendant, and received in payment the defendant's acceptance. When this acceptance was about falling due, the defendant called on the plaintiff, and said he was unable to make up the full amount of the bill, and requested the plaintiff to lend him 70*l.* 3*s.* The plaintiff did so, and received from the defendant an I.O.U.

3. The defendant, on being afterwards applied to by the plaintiff, promised payment of the amount of the I.O.U.

4. The plaintiff subsequently sent an account to the defendant, in which a sum due from the plaintiff to the defendant was credited, and the amount due on the I.O.U. reduced to 64*l.* 8*s.* 11*d.* This balance the defendant also promised to pay, but had not paid.

5. The plaintiff was formerly in partnership with one George Highton. The partnership commenced on the 22nd of April, 1867, and was dissolved on the 1st of May, 1870. By the agreement of dissolution the plaintiff sold his interest in the partnership estate and his share of the assets to Highton, and Highton undertook to pay all debts and to indemnify the plaintiff against the same, and circulars to that effect were sent to the defendant and to other customers of the firm after the bills were drawn as hereinafter mentioned.

6. Amongst the liabilities of the firm of Megrath & Highton

were two bills of exchange, drawn on the 9th and 23rd of April, 1870, respectively, by the defendant, and accepted by Megrath & Highton, for 249*l.* 19*s.* 1*d.*, and 167*l.* 7*s.*, respectively, in payment of goods sold by the defendant to the firm of Megrath & Highton. These bills were negotiated and indorsed by the defendant, and at maturity were in the hands of the Adelphi Bank, Liverpool. At the time of the dissolution, the only liabilities of the firm of Megrath & Highton to the defendant were in respect of the said bills.

7. The bills were dishonored when due; and Highton shortly afterwards stopped payment, and filed his petition in the county court of Lancashire, holden at Liverpool, for liquidation by arrangement under s. 126 of the Bankruptcy Act, 1869.

8. It was afterwards resolved that a composition of 10*s.* in the pound should be accepted in satisfaction of the debts due to the creditors from Highton.

9. The Adelphi Bank was duly represented under the liquidation, and voted in favour of the resolution. The bank proved for an amount including the two bills of exchange above mentioned, and received a dividend of 10*s.* in the pound in respect thereof.

10. The defendant in this action (Gray) subsequently stopped payment, and filed his petition for liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869. A composition of 9*s.* in the pound was accepted by and paid to the creditors under the circumstances hereinafter mentioned. The Adelphi Bank also proved under this liquidation, and received the composition in respect of the two bills of exchange above mentioned.

11. The circumstances under which the composition was paid were as follows:—A proposal was made by Gray, and embodied in the following circular sent to his creditors:—

"Bankruptcy Act, 1869.

"Estate of John Lynes Gray under liquidation by arrangement.

"Meeting of creditors.

"The debtor having made a proposal to the committee of inspection, they consider it their duty to submit it to the creditors; and I beg to give you notice that a general meeting of the creditors will be held on Thursday, the 7th of September next, at, &c., to consider the following proposal by the debtor, viz. that, in consideration of his paying to the trustee within a time to be then specified such a sum as shall, with funds already in his hands, after paying all expenses incurred up to the present time and to be incurred in carrying out this proposal, make up a further dividend of *6d.* in the pound (in addition to the *7s. 6d.* in the pound already declared), and in consideration of his giving to the trustee his promissory note or promissory notes at twelve months for such further sum as will amount to an additional dividend of 1*s.* in the pound, such promissory notes to be guaranteed to the satisfaction of the committee of inspection, he be entitled to and receive an immediate discharge; and that he have handed over to him the books and papers which he delivered to the trustee; and that the trustee be authorized to transfer to the debtor any debts or other effects vested in him and not yet realised. August 28, 1871."

12. This proposal was introduced to the meeting, and a resolution which embodied its terms was passed, and was signed and approved of by Gray.

The schedule of debtors referred to in the resolution contained no reference to the Adelphi Bank or to the two bills above mentioned.

13. The plaintiff's liability in respect of the said bills of exchange was not inserted in the schedule, because the Adelphi Bank was at that time the holder thereof, and they were considered by the trustee as of no value: but there was no intention of reserving to the trustee any right of action in respect of them.

14. The bills were given up by the Adelphi Bank to the defendant in January, 1872: but no claim has been made against him in respect thereof by the trustee.

15. The defendant in this action, on the 1st of March, 1872, commenced an action against the plaintiff to recover the balance due in respect of the said bills, together with interest, after deducting the dividend received out of the estate of Highton.

16. On the 20th of June, 1872, it was arranged between the defendant and the plaintiff, and by the advice of the plaintiff's then solicitor, that the plaintiff should be served with a summons in bankruptcy in respect of the balance due upon the bills, and he

was accordingly so served upon the same day. The plaintiff was willing to pay the defendant the amount claimed, if he could recover it from Highton; and he was served with the summons in order that he might be in a position to press Highton to pay him the balance: but the balance has not been paid either by the plaintiff or by Highton.

17. It was objected on behalf of the plaintiff that evidence was not admissible as to the said proposal and as to the reasons why the plaintiff's liability in respect of the bills was not inserted in the schedule to the resolution; but such evidence was received, subject to the opinion of the Court as to its admissibility.

The question for the opinion of the Court was, whether, on the pleadings as they stood, or on any other state of them, the plaintiff was entitled to recover the 64*l.* 8*s.* 11*d.*

If the Court should be of opinion in the affirmative, a verdict was to be entered for the plaintiff for that amount. If they should be of opinion in the negative, a nonsuit was to be entered.

The case of *Gray* v. *Megrath* was tried before the judge of the Passage Court, Liverpool, when a verdict was found for the plaintiff for 167*l.* 15*s.* 10*d.*, the balance of the two acceptances for 249*l.* 19*s.* 1*d.*, and 167*l.* 7*s.*, respectively, after deducting the dividend received from Highton's estate.

In the following Michaelmas Term, *C. Russell, Q.C.*, on behalf of Megrath, obtained a rule nisi to enter the verdict for him, on the grounds that, upon the facts proved, the plaintiff (Gray) made out no title to sue on the bills in question, and that the release of Highton operated as a release of the defendant (Megrath); or to reduce the verdict to the amount for which the plaintiff (Gray) was made liable on such bills to the Adelphi Bank; the Court to draw any proper inferences, and the rule to be argued with the special case of *Megrath* v. *Gray.*

C. Russell, Q.C., W. H. Butler, and *T. H. James,* for Megrath, contended that his primâ facie claim in the first action was not displaced by any right of set-off legal or equitable under the facts stated in the special case; that the release of Highton under the proceedings in liquidation, which, they submitted, were not strictly proceedings in bankruptcy, was not a discharge under the Bankruptcy Act, but operated as a release at common law, and consequently released his partner and co-debtor, the plaintiff (Megrath); that the resolution of the creditors under Gray's liquidation did not re-vest any interest in the bills in Gray, such interest (if any) remaining in the trustee; that evidence was not admissible to shew the reason for the omission of the two bills from Gray's schedule of debts and assets; and that, at all events, inasmuch as Gray did not become the holder of the bills until after they had arrived at maturity, he could only take them subject to the same equities as they were subject to in the hands of the Adelphi Bank, and consequently could only be entitled to set off the unpaid 1s. in the pound. They referred particularly to ss. 25, 28, 48, 49, 50, 112, 125, and 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and Rules 252 and 253, and cited the following cases: *Leigh* v. *Pendlebury* (1); *Perez* v. *Oleaga* (2); *Teede* v. *Johnson.* (3)

Herschell, Q.C., and *Gully*, for Gray, contended that the discharge of Highton under the proceedings in liquidation (which, they insisted, were strictly proceedings in bankruptcy,) operated only to release Highton, leaving his co-debtor (Megrath) still responsible for the debt or so much of it as should remain unpaid; that the arrangement under Gray's liquidation had the effect of re-vesting the bills in him, notwithstanding their omission from the schedule, the evidence as to which was properly received by the referee by whom the special case was stated; that the trustee under Gray's liquidation proceedings was a mere trustee for him in respect of those bills, which was enough to sustain an equitable set-off; and that Gray was not a mere holder of the bills by a transfer thereof after maturity, but by reason of his having been compelled to meet his liability as a party to them. They commented upon the various provisions of the Bankruptcy Act, 1869, already referred to, and upon the rules, and cited the following cases: *Andrew* v. *Macklin* (4); *Ex parte Rumball* (5); *Wake* v.

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(1) 15 C. B. (N.S.) 215; 33 L. J. (C.P.) 172. 10 Jur NS. 296

(2) 11 Ex. 306; 25 L. J. (Ex.) 65.

(3) 11 Ex. 840; 25 L. J. (Ex.) 110.

(4) 6 B. & S. 201; 34 L. J. (Q.B.) 89. 11 Jur NS. 409

(5) Law Rep. 6 Ch. Ap. 842.

(2) SC 2 Jur NS. 44

Harrop (1); *Ex parte Duignan* (2); *Ex parte Hartel, re Thorpe* (3); and to Bullen and Leake, p. 573.

Cur. adv. vult.

The judgment of the Court (Lord Coleridge, C.J., Keating, J., Brett, J., and Denman, J.,) was delivered by

LORD COLERIDGE, C.J. In *Megrath* v. *Gray*, the plaintiff sued the defendant for goods sold and delivered, for money lent, &c.; and the defendant, amongst other pleas, pleaded a plea of set-off, and a plea upon equitable grounds, that, before the accruing of the causes of action, &c., the plaintiff was indebted to the defendant in an amount equal to the plaintiff's claim, for &c., and afterwards, and after the Bankruptcy Act, 1869, &c., the defendant summoned a general meeting of his creditors under s. 125 of the said Act, and thereupon a trustee was appointed, and the trustee sold to the defendant the debt and claim due from the plaintiff to the trustee in respect of the aforesaid debt by the plaintiff to the defendant for &c., and the plaintiff had not paid the said debt or any part to the said trustee or to the defendant, &c., and the defendant was willing to set-off, &c. The particulars of set-off were for goods, and for money paid to the Adelphi Bank in respect of two acceptances given to the defendant by the plaintiff and one George Highton, then the plaintiff's co-partner in trade.

In the cross-action of *Gray* v. *Megrath*, the plaintiff, Gray, sued the defendant to recover the balance due in respect of the acceptances mentioned in the equitable plea of set-off in the first action, after deducting a dividend received out of the estate of Highton.

In the first action the facts were stated in a special case. They were as follows:—Previous to June, 1873,—after the dissolution between the plaintiff and Highton,—the plaintiff, Megrath, sold goods to the defendant, and received in payment the defendant's acceptance, and afterwards lent the defendant 70*l.* 3*s.* on his I.O.U. to meet the outstanding acceptance, of which 64*l.* 8*s.* 11*d.* was due at the commencement of this action.

The plaintiff was formerly in partnership with one Highton,

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(1) 6 H. & N. 768; 1 H. & C. 202; 30 L. J. (Ex.) 273; 31 L. J. (Ex.) 451. 7 Jur NS 710, Exch

(2) Law Rep. 11 Eq. 604; on appeal, Law Rep. 6 Ch. Ap. 605.

(3) Law Rep. 8 Ch. Ap. 743.

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which partnership was dissolved on the 1st of May, 1870, Highton undertaking to pay all debts and to indemnify the plaintiff, &c. Among the liabilities of the firm of Megrath & Highton were two firm acceptances for 249*l.* 19*s.* 1*d.* and 167*l.* 7*s.* respectively, in favour of the defendant, for goods sold by the defendant to the firm. These bills were indorsed and negotiated by the defendant, and at maturity were in the hands of the Adelphi Bank of Liverpool, and were dishonored. Shortly afterwards, Highton filed his petition under the Bankruptcy Act, 1869, for liquidation by arrangement. It was ultimately resolved that a composition of 10*s.* in the pound should be accepted in satisfaction of the debts due to the creditors of Highton. The Adelphi Bank voted in favour of the said resolution, and proved for an amount including the two bills, and received a dividend of 10*s.* in respect thereof.

The defendant, Gray, afterwards filed his petition for liquidation by arrangement, &c., and a composition of 9*s.* in the pound was accepted and paid. The Adelphi Bank also proved under this liquidation, and received the composition. The circumstances under which this composition was paid were as follows:—A proposal was made by Gray to the committee of inspection, and made known to the creditors by notice, that 7*s.* 6*d.* and 6*d.* in the pound should be paid, and 1*s.* in the pound should be secured by promissory-notes at twelve months, and in consideration thereof that Gray should receive an immediate discharge, and should have handed over to him the books, &c., and that the trustee should be authorized to transfer to Gray any debts or other effects vested in him and not yet realised. A resolution was passed that if by the 1st of October the debtor should pay the 7*s.* 6*d.* and the 6*d.*, and secure 1*s.* more by guaranteed promissory-notes, the discharge of the debtor should forthwith be granted to him, and the trustee be thereupon authorized to transfer the debts owing or alleged to be owing by the persons whose names were set forth in the schedule annexed, and that the close of the liquidation should take place on and from the 1st of October. The plaintiff's liability in respect of the two bills of exchange was not inserted in the schedule, because the Adelphi Bank was at that time the holder of them, and they were considered by the trustee of Gray's estate as of no value; but there was no intention of reserving to the trustee any right of action in respect of them. The bills were given up by the Adelphi Bank to the defendant in January, 1872. No claim has been made against the defendant in respect of them by the trustee.

The case then set out an arranged summons in bankruptcy by the defendant against the plaintiff in respect of the balance due upon the said bills. The case stated that it was objected on behalf of the plaintiff that evidence was not admissible as to the proposal by Gray and as to the reasons why the plaintiff's liability in respect of the bills was not inserted in the schedule to the resolution; but such evidence was admitted subject to the opinion of the Court as to its admissibility.

The question for the opinion of the Court was, whether, on the pleadings as they stood, or on any other state of them, the plaintiff was entitled to recover the 64*l.* 8*s.* 11*d.*

Upon this case it was argued for Megrath, the plaintiff in the first action, that his primâ facie claim for 64*l.* 8*s.* 11*d.* was made out, and that there was no right of set-off, legal or equitable, proved against him; that, if the Adelphi Bank had released Highton, it was by a release subject to the attributes of a common-law release only, and which had therefore released the plaintiff; for, if there was a release, it was by a discharge given in proceedings for liquidation by composition under s. 126 of the Bankruptcy Act, 1869, and such proceedings are not proceedings in bankruptcy, and such a discharge is not a discharge in bankruptcy, but a release at common law.

It was further argued that, if the plaintiff was not released from the debt in question by the discharge given to Highton, still that the defendant could not set it off against the plaintiff's claim, for that any interest which the defendant might have in the claim against the plaintiff passed to his, the defendant's, trustee under the proceedings in liquidation instituted by the defendant, and that such interest, whether it was a joint one with Highton or his trustee, or a separate one in the defendant, had not been retransferred to the defendant by his trustee; that this debt was omitted in the schedule to the resolution passed by the defendant's creditors, and therefore did not pass by such resolution or any deed executed under its authority; that no evidence could legally be admitted to shew the reason of such omission or the intention of the parties; that the Court was in effect asked to reform the resolution or deed upon such evidence, but that a common-law Court cannot reform a document. It was further urged that, if the defendant could set off the amount of the bills, or any balance, as mere holder of the bills, he had only become such holder after the maturity of the bills, and was therefore subject to the same equities as would have been applied against the Adelphi Bank, and could therefore recover or set off at the most only 1*s.* in the pound.

On behalf of the defendant, Gray, it was argued that the debt sought to be set off did at one time accrue to the defendant, for he had become liable to pay and had paid in respect of it that which the plaintiff and Highton were in the first place bound to pay; that such claim had not been extinguished as against the plaintiff by the proceedings between Highton and his creditors, but, on the contrary, those proceedings had left the debt originally due from the plaintiff and Highton jointly to be a debt recoverable from the plaintiff alone; that a discharge of Highton under proceedings in liquidation by composition was a discharge in bankruptcy, and therefore a discharge of Highton alone, leaving the plaintiff solely responsible. It was then argued that the right of the defendant to sue or set off was re-transferred to him by the proceedings under his, the defendant's, arrangement in liquidation, or that, by reason of the intention of his, the defendant's, trustee, of his creditors, and himself (of which evidence was properly admitted) the trustee under his liquidation was at most a mere trustee for him, the defendant, and that he, the defendant, could therefore set off the claim by way of equitable set-off against the plaintiff's demand. It was further urged that, if the defendant should be driven to rely on his right as holder of the bills, he was not a mere holder by transfer after maturity, but a holder by reason of his being a party to the bills, and having been obliged to meet liabilities under them.

Upon these arguments, it appears that Megrath's claim as plaintiff in the first action is not disputed; that, if the defendant in the first action can support his claim of set-off, and if he relies upon it, he cannot maintain his claim as plaintiff in the second action in respect of the same matter on which he has so relied; that, if he, the defendant in the first action, fails to maintain his set-off, it must be either on the ground that the release of Highton was a release of the plaintiff, or that the right of action against the plaintiff was not re-transferred to the defendant; so that, in the first of such cases no one could maintain an action against the plaintiff, and in the second case the defendant would be a wrong plaintiff against Megrath, and in neither case could the defendant in the first action maintain his suit as plaintiff in the second action. (1)

The real question, therefore, is, whether the defendant in the first action can therein maintain his claim of set-off, and, if yes, whether to an amount equal to or exceeding the plaintiff's claim.

The questions for decision then are,—first, whether the discharge of Highton in his liquidation by arrangement, which it is to be observed is throughout both arguments assumed to have been given, was a release of the plaintiff, his solvent co-debtor, or whether such discharge released only Highton, and left the plaintiff to be the sole debtor,—and, secondly, if the latter, whether the interest of the defendant in the right of action against the plaintiff was re-transferred to the defendant under his liquidation by arrangement, or was still in his trustee, or had lapsed, or was legally in his trustee, but held by him as trustee for the defendant. The answer to these questions depends upon the true construction of the Bankruptcy Act, 1869.

Now, that statute is "An Act to consolidate and amend the law relating to bankruptcy;" that is to say, that, where it does not amend, it assumes only to consolidate the existing law. It, by new enactment, or repetition, gives power and sanction to three kinds of settlement between a debtor unable to pay his debts in full and his creditors,—first, by an adjudication of bankruptcy, ending in a division of assets,—secondly, by a liquidation by arrangement, ending also in a division of assets, but without the form of an adjudication of bankruptcy,—and, thirdly, in a liquidation by arrangement, ending in an acceptance by the creditors of a composition in lieu of a division of assets, leaving the debtor in possession of his trade and goods or assets.

The first mode may not improperly be called a pure bankruptcy. It is governed by and fully treated of in the sections from s. 6 to

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(1) That is, to the full extent.

s. 124. Sect. 48 impowers the Court of Bankruptcy, under certain circumstances, and subject to certain conditions, to grant to the debtor an order of discharge. Sect. 49 enacts or declares from what such order shall not and from what it shall release the bankrupt. Sect. 50 enacts that the order of discharge shall release only the debtor. The second mode is in the statute set forth in s. 125: the third, in like manner, in s. 126. Both these may be said to be, as set forth in the statute, skeleton schemes, to be developed by rules. Such development is carried out in the rules commencing with rule 252.

The first kind of settlement ends in a discharge of the debtor by order of discharge given according to s. 48. And so likewise do the other two kinds of settlement end in an order of discharge: they do so by and according to the rules 302 and 303, and in the forms 123 and 124. And the first question for decision seems to be, whether the enactments in ss. 49 and 50 apply only to a discharge given in a pure bankruptcy, or to all the discharges given under and by virtue of and according to the statute and rules.

On the one side it is contended that the words used in ss. 49 and 50, like those in all the earlier sections, confine the application of the sections to the case of a person *who is a bankrupt*. "When *a bankruptcy* is closed, *the bankrupt* may apply to the Court for an order of discharge:" s. 48. "An order of discharge shall not release *the bankrupt* from any debt," &c.; "but it shall release *the bankrupt* from all other debts," &c.: s. 49. "The order of discharge shall not release any person who at the date *of the order of adjudication* was a partner with *the bankrupt*," &c. And the arrangements spoken of in ss. 125 and 126 are specifically declared "*not to be in bankruptcy.*" "A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may, by a special resolution, &c., declare that the affairs of *the debtor* are to be liquidated by arrangement and *not in bankruptcy*," &c.: s. 125. "The creditors of a debtor unable to pay his debts may, *without any proceedings in bankruptcy*, by an extraordinary resolution resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor:" s. 126. And in s. 125, subs. 9, it is in terms enacted that "the provisions of this Act with respect to the discharge of a bankrupt shall not apply in

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the case of a debtor whose affairs are under liquidation by arrangement."

On the other side it is said that the Act and rules are dealing in all three cases with a debtor who is insolvent; that, by rule 252, the proceedings under ss. 125 and 126 are both commenced by a petition of the debtor, which is to be according to the form No. 106 in the schedule, and which therefore is an allegation by the debtor that he is unable to pay his debts, and which is in effect that he is bankrupt; that such a declaration is an act of bankruptcy; that by the statute itself it is so treated, for, by s. 125, subs. 12, and by the end of s. 126, the Court may upon it adjudge the debtor a bankrupt; that by subs. 7 of s. 125 it is enacted that, "with the modification hereinafter mentioned, all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation, and the word 'bankruptcy' included liquidation by arrangement;" that subs. 9 modifies only the mode in which and the time at which a discharge of the debtor shall or may be given in proceedings of liquidation by arrangement; that such modification is that mentioned in subs. 7; that, in case of liquidation by arrangement under s. 125, subs. 10 clearly applies ss. 49 and 50 to the discharge given under s. 125; that the settlement under s. 126 is no less a liquidation by arrangement than that under s. 125; that the regulations in s. 125 are made with respect to "liquidations by arrangement;" that the discharge, therefore, given under s. 126, according to the rules 102 and 103, and in the forms 123 and 124, is made subject to those regulations, and has precisely the same effect as a discharge given under s. 125; that the phrases "and not in bankruptcy" in s. 125, and "without any proceedings in bankruptcy" in s. 126, apply only to the forms of procedure; that the word "bankrupt" in ss. 49 and 50 includes every debtor who is made subject to the bankrupt laws, i.e. to the statute, "whether he is so made by his own act or the act of his creditors."

It is undoubted that there is great force in both these sets of arguments: the question is, which is to prevail.

Now, it has always been a cardinal point of bankruptcy law that a discharge under it of an insolvent debtor unable to pay his debts

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in full does not release his solvent co-debtor. This has been so ever since the declaratory Act, 10 Anne, c. 15. Each successive Bankruptcy Act has been in a great measure a consolidation Act, and has incorporated this principle. It is a strong argument in favor of the defendant's contention in this case that such a cardinal principle would hardly be cut away from any discharge of any insolvent debtor, without express terms. It is also a strong argument that a consolidation statute should be construed rather so as to maintain than to alter the existing law. Under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by s. 161 it is stated that "the order of discharge shall upon taking effect discharge *the bankrupt*," &c.: and by s. 163, "the order of discharge shall not release or discharge any person who was a partner with *the bankrupt*," &c. The deed of composition authorized by that statute is described in s. 194 as a deed by which a debtor, *not being a bankrupt*, conveys, &c. It was thereupon argued in *Andrew* v. *Macklin* (1), that a release in a composition deed of a debtor, being a release not in bankruptcy, released also his solvent co-debtor. The case is but shortly reported: but the arguments which have been urged as to the construction of the statute now under discussion must have been obvious to the Court of Queen's Bench as applicable to that similar statute. Their decision, therefore, overruled those arguments, and held in effect that the word "bankrupt" in ss. 161 and 163 of that Act covered the case of a release in a composition deed described in another part of that statute as a deed not given by a bankrupt, that is to say, given by a person not formally adjudicated a bankrupt. That case seems to be a strong authority in favor of the preponderance of the argument on behalf of the defendant Gray in this case. In *Ex parte Duignan* (2), the Court of Appeal in Bankruptcy held that the filing of the petition under rule 252 of the present statute is an act of bankruptcy. In *Ex parte Rumball* (3), the contention was that s. 72 in the Act of 1869 did not apply to disputes arising in proceedings under a deed of composition entered into in 1868, because, it was said, s. 72 is confined to "proceedings in bankruptcy:" but it was held that it was applicable. "The Act of 1869," says Lord Justice James,

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(1) 6 B. & S. 201; 34 L. J. (Q.B.) 89. (2) Law Rep. 6 Ch. Ap. 605.

11 Jur NS 408 (3) Law Rep. 6 Ch. Ap. 842.

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"gives to the Court of Bankruptcy jurisdiction to determine all questions for the distribution of assets in bankruptcy, and *extends to anything that might be fairly called a case in bankruptcy.*" "I am of opinion," he says, "that the Chief Judge was right in holding that he had jurisdiction in this case, as *he would have in any ordinary case in bankruptcy.*" That case seems to be an authority for holding that the earlier sections in the statute are not confined to cases of pure bankruptcy, and that the words "proceedings in bankruptcy" are not necessarily confined to proceedings in pure bankruptcy. The minds of the Lord Justices, who are peculiarly the interpreters of bankruptcy law, seem to be, as disclosed in that case, impressed with the view that all the three proceedings, though different in form, are proceedings in bankruptcy, subject to the control of the Bankruptcy Court, subject to the laws of bankruptcy, and intended for the relief of insolvent debtors, and that the more general enactments in the earlier sections are applicable to the proceedings under ss. 125 and 126.

We cannot help thinking that the manner in which the Debtors Act, 1869, deals with fraudulent debtors, gives strong countenance to the view that the negative enactments in s. 49 of the Bankruptcy Act of 1869 are applicable not only to cases of pure bankruptcy but also to cases in liquidation. Frauds in both cases are treated in the later statute as criminal offences, which mode of treating such frauds has been always applicable to frauds in bankruptcy.

In the result, therefore, we adopt the arguments urged on behalf of the defendant Gray; and, in accordance with them and the considerations otherwise pointed out in this judgment, and with authority, we hold that all the three forms of proceeding in the case of an insolvent debtor contained in the Bankruptcy Act, 1869, are proceedings in bankruptcy, though different in form; that the general enactments in ss. 49 and 50 apply to the discharges under ss. 125 and 126 and the rules and forms relative to them; that the word "bankrupt" in ss. 49 and 50 is to be read as applicable to any debtor obtaining an order of discharge under the statute; and consequently that an order of discharge in all three cases releases only the debtor in whose favor it is given, and leaves his solvent co-debtor liable to be sued separately by a joint creditor who has been a party to the release of the insolvent debtor.

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We are of opinion that in this case the discharge of Highton did not release the plaintiff, and that it left the plaintiff liable to a separate suit by the defendant.

As to the second question, we think it unnecessary to determine, for the purposes of the first action, whether the right of action to be relied on as a set-off was at the commencement of the suit legally in the defendant, or whether it was legally in his trustee, to hold in trust for him; because in either case the defendant might maintain his right of set-off in that action. We are of opinion that this right of action was either legally in the defendant, or in law in his trustee to hold it in equity as trustee for him. We think that, in order to establish a trust, the evidence which was objected to was properly admitted, and are of opinion therefore that the defendant in the first action has sustained his claim of set-off as against the plaintiff. The defendant has in respect of the two bills of exchange paid to the Adelphi Bank, under his composition arrangement with them and his other creditors, 9*s.* in the pound, which upon the amount of the bills is more than the plaintiff's claim.

We are of opinion, therefore, that judgment in the first action should be for the defendant on the plea of set-off.

In consequence of our decision being thus in favor of the defendant in the first action, the parties have agreed that the verdict for the plaintiff in the second action shall be reduced to 123*l.* 6*s.* 8*d.* The rule which was obtained in that action will therefore be made absolute to that effect.

Judgment accordingly.

Attorneys for Megrath: *Chinery & Aldridge, and Torr, Janeway, & Co., for Nordon, Liverpool.*

Attorneys for Gray: *J. & R. Gole, for Evans & Lockett, Liverpool.*

[REGISTRATION CASES.*]

1873
Nov. 18.

NOSEWORTHY, Appellant; THE OVERSEERS OF BUCKLAND-IN-THE-MOOR, Respondents.

Parliament—County Vote—"List of Voters"—Unauthorized Alteration by Overseers—Notice of Objection—Service by Post—6 *Vict. c.* 18, *ss.* 6, 40, 100.

5 CPD 258

By s. 100 of 6 Vict. c. 18, an objector may send his notice of objection by post, directed to the person objected to "at his place of abode as described in the said list of voters:"—

Held, that, as regards county voters, "the said lists of voters" means the exact copy of the register sent to the overseers by the clerk of the peace, together with the list of claimants, as defined in s. 6.

Where, therefore, the overseers, finding an incorrect address of a voter in the copy of the register sent to them by the clerk of the peace, altered it by substituting the true address of the voter, and so published it:—

Held, that a notice of objection directed and sent by post to such substituted address was not a compliance with s. 100; and the service of the notice was insufficient.

Appeal from the revising barrister for the eastern division of the county of Devon.

Robert Tucker objected to the name of Robert Noseworthy being retained on the list of voters for the parish of Buckland-in-the-Moor.

In the copy of the part of the register for the eastern division of the county of Devon relating to the parish of Buckland-in-the-Moor sent by the clerk of the peace to the overseers, the name of the voter appeared as follows:—"Robert Noseworthy: Boddacleave in this parish: House and land as occupier: Boddacleave."

The overseers, knowing that Noseworthy had ceased to occupy or reside at the farm called Boddacleave, and was now occupying and residing at a farm called Bowdon, in the same parish, before publishing the list erased the words "Boddacleave" in the second and fourth columns, and inserted the word "Bowdon" in each, and they signed and published the list so altered. In the list published by the overseers the name appeared as follows:—"Robert Noseworthy: Bowdon in this parish: House and land

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* For convenience of reference the Registration Cases for this year are all collected here irrespective of the term in which they were decided.

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as occupier: Bowdon." The original copy of the register sent to the overseers was printed, and the alteration was in writing; Boddacleave in the second and fourth columns being struck through with the pen.

The objector duly sent by post to the voter a notice of objection founded on the 3rd and 4th columns of the register which was in all respects in the form given by 28 Vict. c. 36, sched. A. No. 2, unless it was defective in the matters hereinafter mentioned; and such notice of objection was posted in due time by the objector.

The notice was addressed as follows:—"To Mr. Robert Noseworthy, of Bowdon Farm, Buckland-in-the Moor." This was the correct address of the voter at the time the notice was sent.

On behalf of the voter it was objected that the notice was insufficient, and that the revising barrister had no power to erase the voter's name,—first, because the alteration made by the overseers in the copy of the register sent to them was unauthorized and void, and the notice ought therefore to have been addressed to Boddacleave, and not Bowdon Farm,—secondly, because the voter should at any rate have been addressed in the ipsissima verba of the list as published by the overseers, and the second line should therefore have been "this parish, Bowdon," instead of "Bowdon Farm,"—thirdly, that the revising barrister had no power to expunge the name of Noseworthy from the register, inasmuch as the alteration so made in the description of his place of abode and of his qualification was a mistake of the overseers, within the meaning of 6 Vict. c. 18, s. 40, which he was bound to amend; and that, having made such amendment, and restored the list to its original condition, no person of the name of Robert Noseworthy living at Bowdon, and qualified in respect of the occupation of a farm called Bowdon, would appear on the said list, and the notice of objection would for that reason be null and void.

On behalf of the objector it was answered,—first, that the copy of the register which is by 6 Vict. c. 18, s. 6, made "the list," and which is referred to in 28 Vict. c. 36, sched. A. No. 2, is the copy signed and published by the overseers, and it is therefore the address upon the list so signed and published to which the notice ought to be addressed,—secondly, that, if a correct copy of the

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original register is to be taken to be "the list," the published copy being authenticated in the mode provided by the Act, and published by the persons authorized to do so, an objector is justified in assuming it to be a correct copy of the register and acting upon it, and a notice addressed by him accordingly was sufficient,—thirdly, that, the objector having no means of knowing that the alteration was made by the overseers, and having taken reasonable means to comply with the Act, the notice was a sufficient compliance therewith,—fourthly, that, if a notice addressed according to the list published by the overseers were insufficient, an alteration made by the overseers would render it impossible that the person whose address was altered should be objected to, while no inconvenience would be inflicted on the voter by holding a notice directed to the altered address to be sufficient, because every voter must inspect the published list, in order to be sure that he has not been objected to,—fifthly, that it was not necessary that the notice should contain a fac-simile of the address given on the list, if it gave its meaning, without any variation, which the notice of objection in the present case did,—sixthly, that no amendment made by the revising barrister could prevent the notice having been properly addressed, at the time it was sent, or affect its validity,—seventhly, that, even if the revising barrister was bound to amend the list by restoring the word "Boddacleave," and erasing the word "Bowdon" in the second and fourth columns, he was not bound to do so before deciding upon the validity of the notice of objection; and that, as Bowdon was the then address of the voter the revising barrister should so exercise his discretion, if any, as to uphold the notice of objection.

The revising barrister held that the notice of objection was sufficient, and that he ought not to exercise his discretion, if any, to amend the list until after he had decided upon the notice of objection; and that no alteration, if he made one, in the list, would affect the validity of the notice. He therefore called upon the voter to prove his qualification, which was not done, either in respect of the qualification stated in the original register or in respect of the qualification appearing on the list as altered by the overseers. He thereupon expunged the name of the voter.

The question for the opinion of the Court was, whether the notice of objection was good, and whether the revising barrister had power to expunge the name of Noseworthy from the register of voters.

G. Lewis, for the appellant. Two questions arise here,—1. whether the notice of objection was sufficient,—2. whether there has been a sufficient service. The sufficiency of the service depends upon 6 Vict. c. 18, s. 100, which requires the notice, if sent by post, to be "directed to the person to whom the same shall be sent, at his place of abode as described in the *said* list of voters." Sect. 7 requires the objector to give or cause to be given to the person objected to, or to leave or cause to be left "at his place of abode as described in *such* list," a notice according to the form given in the schedule. The list of voters here consisted of the list of claimants together with the copy of the register (ss. 5, 6) delivered by the clerk of the peace; the overseers had no right to alter that list. *Allen* v. *Greensill* (1) shews that a strict compliance with the Act in this respect is necessary. There it was held not to be sufficient to leave the notice of objection at the voter's office. The distinction is well pointed out by Maule, J., in *Bishop* v. *Helps*. (2) It was there said in argument,—"Suppose this notice had been sent by post directed to the voter's *actual* place of abode, and it had never reached him?" Upon this the learned judge observes: "That clearly would not do; there is no provision for that." Here, the notice was not addressed to the voter at his place of abode as described in the list, but to the place of abode improperly substituted by the overseers. The duty of the overseers as to the publication of the register is defined and limited by s. 3 of the County Voters Registration Act, 1865 (28 Vict. c. 36): "The clerk of the peace of every county shall, together with the precept, transmit to the overseers of every parish or township within such county a sufficient number of copies of the part or parts of the register relating to such parish or township; and the overseers of the poor of every parish and township shall, on or before the 20th of June in every year, and at the same time with the publication of the notice mentioned in s. 4 of the principal Act (3), publish a copy of the register then in force relating to their parish or township," &c.

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(1) 4 C. B. 100; 16 L. J. (C. P.) 142.

(2) 2 C. B. 45, 52; 15 L. J. (C. P.) 43.

(3) 6 Vict. c. 18.

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[DENMAN, J. Is not the list published by the overseers the list to be looked at, notwithstanding the alteration?]

It is not the list in force under s. 49 of 6 Vict. c. 18. Sect. 27 provides for a neglect of the overseers to make out or publish any list; in that case, the register then in force for that parish, &c., is to be taken to be the list of voters for that parish, &c., for the year then next ensuing. But there is no provision for an unauthorized alteration of the list.

[DENMAN, J. The objector is not in fault.]

The voter is not to be deprived of his franchise unless all the requirements of the statute have been complied with by the objector. If the overseers have omitted to insert the name of a claimant who has given due notice of his claim, s. 37 impowers the revising barrister to insert it. But neither he nor the overseers can amend the list when published: *Davies* v. *Hopkins.* (1)

The respondents did not appear.

KEATING, J. The duties of the revising barrister on the revision are prescribed by s. 40 of 6 Vict. c. 18, and very precise directions are given with respect to all the steps which are to be taken,—as little as possible being left to discretion. That section provides, amongst other things, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself or by some one on his behalf in support of such objection, and shall prove that he gave the notice or notices respectively required by this Act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists." Therefore, as a condition precedent to requiring proof of qualification, the party objecting must

(1) 3 C. B. (N.S.) 376; 27 L. J. (C.P.) 6. 4 Jur. N.S. 690

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prove that he gave the notice required by the Act to be given. Here, the objector did appear before the revising barrister and object to the name of the appellant, and he proved that he had sent a notice of objection by the post. Now, the notice is to be such a notice as is required by the Act. We must, therefore, inquire what that notice is. That which is to be done by the overseers as to the list is pointed out by s. 3 of 28 Vict. c. 36. That section provides that "the clerk of the peace of every county shall, together with the precept, transmit to the overseers of every parish or township within such county a sufficient number of copies of the part or parts of the register relating to such parish or township; and the overseers of the poor of every parish and township shall, on or before the 20th of June in every year, and at the same time with the publication of the notice mentioned in s. 4 of the principal Act (6 Vict. c. 18), publish a copy of the register then in force relating to their parish or township," &c., and s. 5 of the principal Act contains similar enactments as to publication on the 1st of August It is clear, therefore, that it is the duty of the overseers to publish that which is sent to them, and that is a copy of the register. That being published, the voter may be objected to by any person on the register: and the person objecting is to send the notice of objection to the voter in the manner prescribed by s. 7 of 6 Vict. c. 18, and which notice is now to be according to the form No. 2 in sched. A. to 28 Vict. c. 36, and is to be addressed to the voter at "his place of abode as described in such list." Now, what is the list? The Act, 6 Vict. c. 18, provides by s. 6 that the list shall consist of the list of claimants, together with the copy of the register, which is sent by the clerk of the peace to the overseers, and which they are bound to publish. It is clear that the duty of the overseers is to publish the list in its integrity, just as they receive it. The difficulty in the present case has arisen from the overseers not having obeyed the directions of the statute in this respect, but having taken upon themselves to alter the qualification and the place of abode of the voter as described on the register. The objector, no doubt, was misled by that; and accordingly he adopted the address as altered by the overseers, and sent the notice to that address, and not to the address which appeared in the copy sent by the clerk of the peace to the overseers. The objector appeared before the revising barrister, and was called upon to prove that he had given the notice required by law. Now, the Act (6 Vict c. 18, ss. 7, 100) provides three ways of giving notice,—personally, or by leaving it at the place of abode of the voter as described in the list, or by sending it by post. The objector here adopted the last of these three modes; and accordingly he proved before the revising barrister that he sent the notice by the post addressed to the voter at his place of abode as described in the altered list, and not as described in the copy of the register transmitted to the overseers by the clerk of the peace. The question is whether that is a compliance with the statute. We are not embarrased with the question whether, having failed to prove the service of the notice of objection by post, the objector could have resorted to either of the other modes of proof. I think he could; but he might still be met by the objection as to the form of the notice. I am of opinion that the service as proved before the revising barrister was not a compliance with the statute.

By s. 40 before the voter can be called upon to prove his qualification, the objector must prove that he gave the notice of objection required; and where, as here, the service is by the post, he must prove that he duly posted the notice as required by s. 100, that is, that he sent a notice "directed to the person to whom the same shall be sent, at his place of abode *as described in the said list of voters.*" Now, "the list" there means the list which the overseers ought to publish, viz. the copy of the register transmitted to them by the clerk of the peace. If, instead of publishing the copy as they receive it, the overseers take upon themselves to alter it, a person acting upon it does so at his peril. I can very well understand the revising barrister looking at the abstract justice of the case, seeing that the address as altered was the true address of the voter; and so far as the merits go, I should feel very much disposed to support his view. But the words of the Act are express. The service was not such as the law requires, and therefore the voter ought not to have been called upon to prove his qualification. The decision of the revising barrister must be reversed.

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BRETT, J. The question in this case seems to me to be whether the revising barrister was in a position to call upon the person objected to to prove his right to be upon the register. It is not every one that he is authorized to call upon to prove his right: he has only a limited authority, under s. 40 of 6 Vict. c. 18, to call upon the party where he has been duly served with a notice of objection as required by the Act. That is made a condition precedent by the following words:—"And, where the name of any person inserted in any list of voters shall have been objected to by the overseers or by any other person, and such other person so objecting shall appear by himself or by some one on his behalf in support of such objection, and shall prove that he gave the notice or notices respectively required by this Act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list." Since the passing of that Act, other Acts have been passed which are incorporated therewith, and among them 28 Vict. c. 36, the 6th section whereof and schedule A. gives a new form of notice. The notice required by 6 Vict. c. 18 is, in the case of counties, provided for by s. 7, and is to be given "to the person so objected to, or left at his place of abode *as described in such list.*" A further mode of service is reserved to the objector by s. 100, viz. by sending the notice by post, "directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." The objector, therefore, may satisfy s. 40 in either of three ways. He may prove personal service of the notice: or he may prove a service by leaving the notice at the place of abode of the voter: or he may take upon himself the further privilege of, and prove, sending it through the post. The manner of proving the last-mentioned mode of service is by production of the stamped duplicate, which, according to *Bishop* v. *Helps* (1), is conclusive evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place. The power of serving the notice by post, therefore, is a great privilege given to the objector: and, if

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(1) 2 C. B. 45; 15 L. J. (C.P.) 43.

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he elects that mode of service, he must take care that he complies strictly with the terms of s. 100. He must prove a notice directed to the voter "at his place of abode as described in the said list of voters." Now, what is "the said list?" By ss. 2 & 3 of 28 Vict. c. 36, the clerk of the peace is to make and cause to be delivered to the overseers of every parish and township in his county, his precept, according to a form given in sched. A., together with a sufficient number of printed forms of notices and lists, and of the copies of such part of the register of voters then in force for such county as shall relate to such parish or township respectively. By s. 4 of 6 Vict. c. 18, the overseers are to give notice requiring voters to send their claims, &c. By s. 5, the overseers are to prepare a list of claimants and are to publish it, together with the copy of the register then in force relating to their parish or township. And s. 6 enacts that "the list of claimants so to be made out by the overseers, together with the said copy of the register for the time being relating to the same parish or township, shall be deemed to be the list of voters of such parish or township for the county within which such parish or township may be situate." "The list of voters," therefore, is, the copy of the old register and the list of claimants. If the objector elects to send his notice of objection by post, he must therefore take care that it is addressed correctly according to the address of the voter on the copy of the register in force at the time. It may be that the overseers have omitted to publish any list. That is provided for by s. 27 of 6 Vict. c. 18. In that case the register of voters for that parish shall be taken to be the list of voters for that parish for the year then next ensuing. It may be that the overseers by blundering may publish that which is not a correct copy of the old register. In that case they commit a breach of the Act for which they may be liable to an action or to a fine under s. 51 of 6 Vict. c. 18. But that will not release an objector who has elected to send his notice by post from performance of the requirements of the Act on his part, viz. by sending it properly directed to the voter at his place of abode as described in the list. Has the objector done that here? I accede to the view that the only evidence given before the revising barrister of service of the notice was of a service by post. That notice was directed, not to the address of the voter as described in the copy of the register sent by the clerk of the peace to the overseers, but according to

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an address improperly inserted by them in that list. The objector, therefore, has failed to satisfy the condition precedent to the authority of the revising barrister to call upon the voter to prove his qualification. It appears from *Norris* v. *Pilcher* (1) that, notwithstanding he has failed to prove due service by post, the objector might still prove a service by either of the other modes of service provided by the Act. But no such proof was offered here. I am therefore of opinion that the decision must be reversed.

GROVE, J. I am of the same opinion. The turning point of the question in this case seems to me to be what is the construction of s. 100 of 6 Vict. c. 18, and especially of the words at the beginning of that section, "that it shall be sufficient in every case of notice to any person objected to in any list of county, city, or borough voters, if the notice so required to be given as aforesaid shall be sent by the post, free of postage, &c., directed to the person to whom the same shall be sent, *at his place of abode as described in the said list of voters*." Looking through all the intervening sections till we come back to s. 5, I find no provision in the statute making the list published by the overseers the only list authorized to be looked at. If it had been so, I should have inclined to think the objector not responsible for the default or mistake of the overseers. Sect. 6 does not make this the authorized list. It throws us back to the provisions contained in s. 5, which give the overseers a limited power to deal with the list of claimants and copy of the old register which they receive from the clerk of the peace, by making certain marginal additions thereto, and directs them to publish the list of claimants and the copy of the register. If the proper construction of s. 100 is that the words I have read refer to the list and copy of the register which the overseers are directed by s. 5 to publish, then the list which the objector here relied on was not "the said list," but a list which the overseers, having no power by the statute to do so, had thought fit to publish in an amended form. Has, then, the objector complied with s. 100? Has he sent his notice directed to the voter "at his place of abode as described in the said list of voters?" He has not done so; but he has sent it to another place of abode, and not to the place of abode as described in the only authorized list. This, no doubt, imposes a hardship upon the objector. But the hardship would be equally great, if a voter should be disqualified by an unauthorized act of the overseers. I am of opinion that the service of the notice was not a compliance with s. 100, and that the voter ought not to have been called upon to prove his qualification.

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(1) Law Rep. 4 C. P. 417.

DENMAN, J. I am of the same opinion. It is hard, no doubt, that an objector should lose his power of objecting through a mistake of the overseers. We, however, have only to put a proper interpretation upon s. 100 of 6 Vict. c. 18. I agree that the words "said list of voters" mean the last register as sent by the clerk of the peace and the list of new claims. The alteration of the list was an unauthorized act of the overseers, and I think the objector, if he chose to avail himself of the privilege of sending his notice by the post, was bound to see that he sent it to the place of abode as it appeared on the register. I therefore agree with the rest of the Court that the decision of the revising barrister was wrong. I must, however, observe that it would have been much more satisfactory to my mind if the case had been argued on both sides.

Decision reversed.

Attorneys for appellant: *Coode, Kingdon, & Cotton, for John Daw, Jun., Exeter.*

Nov. 19.

SHERWIN, APPELLANT; WHYMAN, RESPONDENT.

Parliament—County Vote—Sufficient Description of Qualification—"Rent-charge on freehold house"—Amendment—Form of Consolidated Appeal—Indorsement on Case—6 *Vict. c.* 18, *ss.* 40, 42–44, 100.

It is not necessary that the indorsement on the back of the case in a consolidated appeal, should set forth the names, &c. of all the appellants; it is sufficient if it give the name of the person who appeals on behalf of himself and the other appellants, the names &c. of the other appellants appearing in the body of the case.

The qualification of a county voter was described in the third column of the list as "rent-charge on freehold house":—

Held, that the description was sufficient as pointing to a freehold rent-charge, or that, if not, the revising barrister should have amended.

APPEAL from the decision of the revising barrister for the southern division of the county of Derby.

The respondent duly objected to the name of the appellant being retained upon the list of voters for the parish of St. Alkmund, Derby, and grounded his objection on the third column of the register in respect of the nature of the appellant's interest in the qualifying property.

The entry on the list of voters was as follows: "Sherwin, Samuel;" "Cherry Street, Derby;" "Rent-charge on freehold house." "Parker Street, W. B. Sherwin, owner."

It was contended on behalf of the objector that the qualification of the appellant as stated in the list of voters was insufficient in law to entitle him to vote, on the ground that the rent-charge was not stated in the third column to be a "freehold rent-charge."

It was contended on behalf of the appellant that the qualification as stated was sufficient. That a freehold rent-charge was the only rent-charge which could confer a vote, and that therefore the omission of the word "freehold" was immaterial, and at most a misnomer or inaccurate description, and further, that the barrister had power to amend by adding the word "freehold," if amendment was necessary.

The barrister was of opinion that under 8 Hen. 6, c. 7, a freehold tenure was the very essence of this qualification, and that this did not appear on the face of the list, either by an absolute statement or by necessary implication; from this it followed that in his opinion the case was not one of misnomer or of inaccurate description within s. 101 of the Registration Act, 1843, and that there was no power to amend under s. 40 of the same Act. He consequently expunged the name from the list of voters.

The names of fourteen other persons, contained in a schedule annexed to this case, and all in like manner duly objected to by the said respondent, were expunged upon the same grounds from the lists of voters for the several parishes of St. Alkmund, Derby, Litchurch and Littleover, in the said southern division of the county of Derby. Their several cases depend on the same points of law as this case, and ought to be consolidated therewith.

If the Court should be of opinion that the decision was wrong, then the names of the appellant and the said several other persons are to be restored to the said several lists of voters with or without amendment as the Court shall think fit.

Then followed the signature of the revising barrister and the following statements were appended:

"I, for myself, and on behalf of all the other persons who are interested as appellants in this matter, and whose names are written in the schedule herewith annexed, do appeal against this decision and agree to prosecute this appeal.

(Signed) "Samuel Sherwin."

"I agree to appear and answer this consolidated appeal.

(Signed) "Robert Whyman."

Then followed the schedule.

The indorsement on the back of the case signed by the barrister only gave the name of Samuel Sherwin, Cherry Street, Derby, as appellant, and that of Robert Whyman, of London Street, Litchurch, as respondent.

H. S. Giffard, Q.C., (*Gorst* with him), for the respondent, objected that the case as stated by the revising barrister did not comply with the provisions of the Registration Act, 1843, ss. 44, 45, with reference to consolidated appeals. It is necessary in order to comply with the provisions of the statute that the names and places of abode of all the appellants should appear in the indorsement signed by the barrister: *Wanklyn* v. *Woollett* (1) decides that the 45th section imposes in the case of consolidated appeals all the requisites of the 42nd section as to single appeals. It follows, therefore, that all the names should appear on the indorsement. Wilde, C.J., in delivering judgment, says, that the identity of all the parties to the appeal can only be established by the signature of the barrister to the indorsement, that being the mode of authentication pointed out by the Act. Here there is no signature of the barrister to the indorsement recognising the right of each appellant to appeal, for only one appellant's name is indorsed. There is nothing to shew that there were several appeals to consolidate.

[KEATING, J. The statement as to the consolidation is in the body of the case.]

There is nothing in the body of the case to shew that there actually were several appellants who all gave notice of appeal. All that is found is that several cases depended on the same point. It is quite consistent with the case that several of the claimants were satisfied with the barrister's decision and did not want to appeal. In the case of the appeal failing the respondent has a right to have the necessary formalities as to consolidating the appeal appear on the face of the case, inasmuch as his right to costs may depend on their observance.

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(1) 4 C. B. 86; 16 L. J. (C.P.) 144.

[Keating, J. We must no doubt be able to see from the case that there were really several appeals which have been consolidated, but surely that sufficiently appears, taking the indorsement together with the body of the case.

Brett, J. It would be extremely inconvenient if it were necessary to indorse a large number of names.]

Coleridge, C.J. I am of opinion that this case must proceed. There are four sections of 6 Vict. c. 18 to which our attention has been drawn. The 42nd section gives the procedure in the case of single appeals. The 43rd section may be passed over. The 44th section enacts the mode of procedure with regard to consolidated appeals, and the 45th section enacts that in and with regard to every such consolidated appeal the like proceedings shall be had and taken, and the like rules and regulations shall apply as in the case of any other appeal under this Act. I should quite agree that if it did not appear that substantially the mode of procedure pointed out by s. 44 had been complied with, the preliminary objection must prevail. I am, however, of opinion that all the conditions of the 44th section do sufficiently appear from this case to have existed. It appears from the case that fourteen other persons named in the schedule were all objected to, and their names were expunged on the same grounds. The barrister states that "their several cases all depend on the same point of law as this case, and ought to be consolidated therewith." It seems to me that, according to a reasonable construction, the case does sufficiently show that there were fourteen appeals which the barrister was of opinion should be consolidated. If any doubt could exist, it further appears that Sherwin did, in the form prescribed by the 44th section, undertake to be appellant in the consolidated appeal on behalf of himself and the others, and Whyman undertook to be respondent. Though their signatures are subsequent to the barrister's signature of the case, still they are anterior to that of the barrister to the indorsement, and we must take it that by his signature to that indorsement he authenticates what is in the body of the case and schedule. Therefore, it seems that the conditions of the 44th section, which governs this case, are sufficiently complied with. We were pressed with the authority of the case of *Wanklyn* v. *Woollett* (1). When that case is carefully considered it will appear to be distinguishable from the present. There the Court were asked to try an appeal which did not fulfil the requisites of the Act, inasmuch as it did not comply with a direction which, by the 62nd section, is made a condition precedent to the appeal, viz., the signature of the barrister. The Court held that such signature was a condition precedent, and that inasmuch as it had not been appended to the case in due time the Court had no jurisdiction. That case is entirely different from the present.

KEATING, J., concurred.

BRETT, J. It seems to me that the 42nd section taken by itself is a mere directory enactment as to single appeals, and that the 44th section is also a mere directory enactment as to consolidated appeals; but that, as to the 42nd section, a part of that which is directed to be done, is by the 62nd section made into a condition precedent. It is enacted by the 42nd section that "the said barrister shall read the said statement to the appellant in open Court, and shall then and there sign the same," and "the said barrister shall then indorse upon every such statement the name of the county, &c., and shall sign and date such indorsement." If that had only appeared in the 42nd section, I think it would have been directory; but the 62nd section says, that "every appellant, &c., shall transmit to the masters of the said Court of Common Pleas the statement in writing so signed by the revising barrister as aforesaid." That, it appears to me, makes the signature of the barrister a condition precedent, and this is what, in my opinion, the case of *Wanklyn* v. *Woollett* (1) decided. Wilde, C.J., refers to both the 42nd and 62nd sections, and it is on the latter that he bases the decision that as the case was not signed there was no jurisdiction. The same point was also decided in *Burton* v. *Brooks*. (2) Now s. 44 seems to me to be in like manner directory only with regard to consolidated appeals; but it says that "the said barrister shall in such case state in writing the case, and his decision thereon in manner hereinbefore mentioned, &c., and shall read such statement and sign the same as hereinbefore mentioned." It incorporates that part of s. 42 which says that there must be a signature, and so it thereby incorporates that part of s. 62 which applies to the signature of the barrister, and consequently it is necessary that the indorsement should be signed by the barrister. That indorsement is to contain the name of the appellant, that is, as it appears to me, in a consolidated appeal, the name of the appellant selected by the barrister to represent the others. Thus, if there was here a consolidated appeal, if there were different appellants, and the barrister selected Sherwin to be appellant in such appeal, the conditions of the Act have been complied with. This reduces the question to one of construction of the case, and I agree, for the reasons given by my Lord, that it sufficiently appears upon the case that there were several appellants, and that the appeal was consolidated, and Sherwin named by the barrister as appellant.

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(1) 4 C. B. 86; 16 L. J. (C.P.) 144. (2) 11 C. B. 41; 21 L. J. (C.P.) 7.

GROVE, J., concurred.

Sir H. James, A.G. (with him *Edwards*), for the appellants. The qualification was sufficiently described, or, if not, the revising barrister had power to amend, and should have amended. No rent-charge but a freehold rent-charge would give the qualification, and, therefore, no one could be misled by the description of the qualification: *Warburton* v. *Denton.* (1) The result of the cases is that if the description taken in one sense applies to that which would be a qualification, and in the other sense to that which would not, it must be taken in the former sense. [He cited *Longfield* v. *O'Connor*, cited in Rogers on Elections, 11th ed. pp. 141, 142; *West* v. *Robson* (2); *Nicholls* v. *Bulwer* (3); *Howitt* v. *Stevens.* (4)]

H. S. Giffard, Q.C. (with him *Gorst*), for the respondent. The cases cited are distinguishable from the present case. There the question was whether the barrister had power to amend, and it was held that he had. But he appears here to have found as a

(1) Law Rep. 6 C. P. 267.

(2) 3 C. B. (N.S.) 422; 27 L. J. (C.P.) 262. 4 Jur NS 666

(3) Law Rep. 6 C. P. 281.

(4) 5 C. B. (N.S.) 30; 28 L. J. (C.P.) 105. 5 Jur NS 123

fact that the qualification was not so described as to be capable of being commonly understood.

[KEATING, J. Even if that be so, he seems to have intended to refer the question, whether he was right in so thinking, to us as part of the case.]

The Court cannot say that his finding was wrong. If the description, though inaccurate, is such that it would be popularly understood to refer to the qualification claimed, the barrister may amend to render it accurate; but if it would not be popularly understood to refer to such a qualification, he cannot. The question, therefore, is whether the word "rent-charge" must be considered as necessarily, in popular parlance, meaning a freehold rent-charge. [He cited *Birks* v. *Allison.* (1)]

COLERIDGE, C.J. I am of opinion that this appeal must be allowed, and the decision of the revising barrister reversed. It seems to me that he intended to leave to us two questions: viz., whether the qualification was sufficiently described, and, if not, whether, under the circumstances, he had power to amend. He decided in the negative on both points: he thought that the qualification was insufficiently described, and that it was so insufficiently described as to deprive him of the power of amendment. I am of opinion that he was wrong on both points. I should have thought, speaking for myself, the description was good enough as it stood. The principle of the decision in *Howitt* v. *Stevens* (2) seems to me to be this, viz. that when the description of the qualification describes that which is a qualification or that which is no qualification, the Court will not be astute to give it the latter effect. Secondly, if that be not so, I think the case was well within the power of amendment given by the Act. If the barrister meant to hold that, because the freehold nature of the rent-charge did not appear by absolute statement or necessary implication, there could be no power of amendment, he seems to me to have come to a wrong conclusion as to the nature of the power of amendment given to him. Therefore, looking at the description as it stands or with relation to the power of amendment, I think our decision must be for the appellants.

(1) 13 C. B. (N.S.) 12; 32 L. J. (C.P.) 51. 9 Jur NS 692
(2) 5 C. B. (N.S.) 30; 28 L. J. (C.P.) 105. 5 Jur NS 123.

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Keating, J. I also think that the barrister was mistaken on both points. It seems to me that the description of the qualification as it stands is sufficient. It is only a freehold rent-charge that can amount to a qualification. I do not see why the description should be read as meaning that which would not give a vote. I think it is reasonably capable of the interpretation put on it by my Lord, viz. as being such a rent-charge as would constitute a qualification, that is, a freehold rent-charge. If it were otherwise, I should think there can be no doubt whatever that it was the duty of the revising barrister to make it sufficient if necessary by the addition of the word "freehold," and that such an alteration was entirely within his powers. I cannot agree with Mr. Giffard that the barrister intended to conclude us by finding that it was not such a description as would be commonly understood.

Brett, J. I am of the same opinion. I take it as clear that the description of the qualification in the third column need never be strictly accurate. It is enough if, though the description be not strictly accurate, the qualification be sufficiently described to be capable of identification. If this description had been equally applicable to either of two different qualifications, I should have had the same doubts as I expressed in the cases of *Townshend* v. *Marylebone* (1), and *Ford* v. *Boon*. (2) I should have doubted whether the qualification was so sufficiently described as to be capable of identification. It is to be noticed, however, that the majority of the Court in the former case, and the whole Court in the latter, thought that a description capable of being applied to either of two different qualifications was capable of amendment. That case is stronger than the present. Here the description, though not strictly accurate, because it might describe only a chattel interest, if it were the description of a qualification at all, could only be the description of one qualification, viz. a freehold rent-charge. Therefore, I incline to think that no amendment was required; but the case of *Howitt* v. *Stevens* (3) and *Birks* v. *Allison* (4), which followed it, are absolute authorities for shewing that the barrister might have amended. The barrister decided that it did not appear expressly or by necessary implication that the rent-charge was freehold, and therefore that it followed that it was not a case of misnomer or inaccurate description, and, consequently. he had no power to amend. It seems to me that this decision was erroneous in point of law, and that he had power to amend. He ought, therefore, to have gone on, and satisfied himself whether the description was sufficient for the purposes of identification, and if so, then whether the voter had the qualification described. He stopped short, and inquired into neither of the two subsequent questions on the ground that neither expressly nor by necessary implication it appeared that the rent-charge was freehold. It appears to me that his decision was wrong, and must be reversed.

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(1) Law Rep. 7 C. P. 143.

(2) Law Rep. 7 C. P. 150.

(3) 5 C. B. (N.S.) 30; 28 L. J. (C.P.) 105. 5 Jur ns 723

(4) 13 C. B. (N.S.) 12; 32 L. J. (C.P.) 51. 9 Jur ns 692

Grove, J. I am of the same opinion. It seems to me that in construing these provisions, we have to look to the object for which they were enacted. The description of the qualification is required for the purpose of enabling any person to look into the validity of the claim, and that he may know what is the nature of the qualification claimed, as, for instance, whether it is freehold or leasehold. It seems to me that this would be sufficiently provided for, if enough were stated to distinguish the qualification claimed from all other qualifications given by the Act, for that would sufficiently inform any one what qualification was claimed. I do not see in the present case how any one could be misled as to the nature of the qualification claimed. I do not agree with the revising barrister that the nature of the qualification is to be so exactly described as to amount to a definition of it. Then, secondly, I do not think the power of amendment is limited to cases of inaccurate description within the 101st section. The words of the two sections are different. That section speaks of an "inaccurate" description; the 40th section speaks of an "insufficient" description. The power of amendment appears to me to depend wholly on the 40th section, and the test given by that section is whether an amendment will alter the nature of the qualification. It seems to me quite clear that the addition of the word

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"freehold" in the present case would not have altered the nature of the qualification.

Decision reversed.

Attorney for appellant: *Greenfield.*
Attorney for respondent: *Somerville.*

Nov. 19.

LORD RENDLESHAM, APPELLANT; HAWARD, RESPONDENT.

Parliament—County Vote—Irish Peer.

Port 742
1 CPD. 197.

An Irish peer, who is not one of the representative peers for Ireland, nor the representative of any constituency in Great Britain, is not entitled to be placed on the register of voters.

APPEAL from the decision of the revising barrister for the eastern division of the county of Suffolk.

Objection was made to the name of the appellant, Baron Rendlesham, on the list of voters.

The appellant was, during the qualifying period, an Irish peer, and was not, and never had been, a representative peer or a member of parliament. He was duly qualified to have his name retained in the list and to be registered as a voter in respect of the qualification described in the list, unless disqualified by the fact of his being an Irish peer.

It was contended on behalf of the objector that the appellant was not entitled to have his name retained upon the list by reason of his being an Irish peer. It was contended on behalf of the appellant that, as a peer of Ireland elected a member of the House of Commons, and who had not declined to serve as such member, was entitled to vote at the election of knights of the shire, and that as the appellant was in other respects qualified to vote, he was entitled to be registered in order to enable him to exercise such right of voting in the event of his being elected a member of the House of Commons and not declining to serve as such member.

The revising barrister decided that the appellant, being a peer, and not during the qualifying period, nor at the time of the registration, elected a member of the House of Commons, was not entitled to vote at the election of knights of the shire, and consequently not entitled to have his name retained upon the list; and he accordingly expunged the name.

O'Malley, Q.C., for the appellant. Two questions arise in the present case—first, whether an Irish peer, not being a representative peer, is subject to any incapacity for voting; and secondly, whether he is not in any case entitled to be on the register. It is submitted that the case of *Earl Beauchamp* v. *Madresfield* (1) is distinguishable from the present case. An English peer labours under a perpetual incapacity to vote. At the most an Irish peer may or may not be incapacitated, for if he be elected and serve as a member of parliament, he has the same rights as a commoner, and is entitled to vote. In the *Droitwich Case* (2), with reference to the vote of Viscount Southwell, the resolution of the House of Commons was read, viz.: "That no peer of this realm, except such peer of that part of the United Kingdom called Ireland as shall for the time being be actually elected, and shall not have declined to serve, for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in Parliament." It was argued with respect to the vote that Lord Southwell having been on the register the committee could not go behind the register; but the committee resolved that they were of opinion that there was no statute under which the barrister could have excluded from the list the name of Lord Southwell; but feeling themselves called upon to enforce the standing order of the House against the interference of peers in elections, they overruled the counsel for the petitioner. That case, so far as it goes, is directly in point here; and it is contended that the resolution of the committee correctly expresses the law.

[COLERIDGE, C.J. It is provided by the 4th article of the Act of Union (39 & 40 Geo. 3, c. 67), that any peer of Ireland shall not be disqualified from being elected and from serving for any county, city, or borough of Great Britain in the House of Commons, unless he shall have been previously elected to sit in the House of Lords, but that so long as such peer of Ireland shall so continue to be a member of the House of Commons he shall not be

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(1) Law Rep. 8 C. P. 245. (2) Knapp & Ombler's Election Cases, 65.

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entitled to the privilege of peerage nor be capable of being elected to serve as a peer on the part of Ireland, or of voting at any such election, and that he shall be liable to be sued, indicted, proceeded against, and tried as a commoner for any offence with which he may be charged. The effect seems to be to reduce him to the position of a commoner while he sits as a member of the House of Commons.]

The result is that he may be perfectly well qualified to vote at the time of election; and yet, if the respondent's contention be correct, and the barrister is bound to strike him off the list, he cannot have the advantage of that qualification. It must be admitted that a certain amount of difficulty arises with relation to the wording of some of the Acts. The sections, for instance, in the Representation of the People Act giving the right to vote for counties, viz. the 5th and 6th sections, make it part of the qualification that the claimant should be "of full age and not subject to any legal incapacity." But it is contended that this refers to the right of voting, not the right to be on the list.

[BRETT, J. This is a personal disability if any. Are not such disabilities to be considered at the time of registration? See *Powell* v. *Bradley*. (1) Take the case of receipt of parochial relief.]

No doubt that would be for the revising barrister to consider.

[BRETT, J. The same thing applies to infancy, and yet the infant may come of age between the time of registration and the election.]

The 40th section of 6 Vict. c. 18, is, it must be admitted, somewhat against the appellant's contention; that section says, "In case it shall be proved that such person was then (i.e. on the 31st of July) incapacitated by any law or statute from voting, &c., such barrister shall expunge the name." But the appellant certainly was not incapacitated by any statute, and it is contended that he was under no incapacity by law within the meaning of this section. He is incapacitated not by the common law, but by reason of a resolution of the House of Commons, which no doubt that house had power to make and enforce with respect to its own body, but which it may at any time rescind, and the existence of it endures only for the session. The House of Commons, of itself, by rescinding this resolution could withdraw the only difficulty which stands in the appellant's way. Can it be said that this is an incapacity by law?

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(1) 18 C. B. (N.S.) 65; 34 L. J. (C.P.) 67. /10 Jur N S 1241

[GROVE, J. Can the resolution be considered otherwise than as declaratory of the general law?]

There seems to be no reason why an Irish peer should not have voted before the Act of Union. If so it could hardly be part of the common law.

[BRETT, J. The Act of Union expressly gives Irish peers the rights of commoners in a particular case. Does not this imply they have no such rights in other cases?

KEATING, J. The 1 Hen. 5 speaks of the "Knights and Esquires and others who shall be choosers of such knights of the shires," which looks as if it was not contemplated that any above the rank of knight should join in choosing.]

In Elliott on Registration, 2nd ed. p. 262, the following passage from Heyw. Co. p. 316, is cited: "When the members of the House of Peers were first excluded from voting at the election of members of parliament does not exactly appear. The returns preserved by Prynne shew that in the earlier periods of our history they exercised that privilege, and even after their personal attendance at the county court had fallen into disuse, we find instances in which their attorneys returned the knights of the shire."

G. Browne, for the respondent, was not called upon.

COLERIDGE, C.J. I am of opinion that the revising barrister was right, and that his decision must be confirmed. It was decided in the case of *Earl Beauchamp* v. *Madresfield* (1) that peers of this country, by immemorial custom, which is the law of the land, are disentitled to vote at the election of members of parliament, and therefore to be upon the register. The question now referred to us is, whether the case of an Irish peer comes within the same principle. I am of opinion that it does. The Act of Union enacts in plain terms that there shall be one parliament for Great Britain and Ireland, and that the peers of Ireland shall sit by representation in that parliament. The latter part of Article 4 enacts that though they so sit by representation, yet if any peer think fit to be elected to serve and do serve as member for a con-

(1) Law Rep. 8 C. P. 245.

stituency in England, then so long as he elects so to serve he shall not be entitled to the privileges of peerage, and shall be liable to be sued, indicted, &c., as a commoner. The effect is that Irish peers who sit for English or Scotch constituencies lose for the time the status of peers and assume that of commoners. But for that section of the Act it seems to me clear that a peer of Ireland would be in the same position as a peer of Scotland, and though not sitting in the House of Lords, would be disentitled to sit for any constituency. I think that, save so far as the special exception contained in the 4th article goes, a peer of Ireland is a peer of the country within the rule of the common law, as laid down in the case of *Earl Beauchamp* v. *Madresfield* (1), and so disentitled to vote or to be on the register of voters. But it is urged that the disqualification is one which may be removed; and our attention was called to the fact that the House of Commons have resolved in the sessional order of the 27th of April, 1802, that a peer of that part of the United Kingdom called Ireland who has been elected to serve as a member of parliament has a right to vote. The question whether this resolution was declaratory of the law of the land, and how far it could have any binding effect, except so far as it was declaratory, is not now necessary to determine. It is urged that an Irish peer, though not elected or serving as a member of parliament, has a right to be on the register of voters. I do not think this is so. The 40th section of the Registration Act, 1843, provides that the barrister is to expunge the name in case it is proved that the person claiming is then incapacitated by law or statute.

I am of opinion that Lord Rendlesham was incapacitated by law. To what time does the word "then" point? It was decided, as my Brother Brett pointed out, in *Powell* v. *Bradley* (2), that the time of registration is meant, and that the revising barrister is to consider himself substituted for those who used to decide the question of the right to vote at the polling-booths, and to decide whether there is any incapacity at the time of registration. If the incapacity exists, it exists none the less at the time of registration, because it may within the succeeding twelve months be removed. If it were otherwise the same reasoning would apply to various

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(1) Law Rep. 8 C. P. 245.

(2) 18 C. B. (N.S.) 65; 34 L. J. (C.P.) 67. 10 Jur
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incapacities which the lapse of time would remove; as, for instance, when the claimant is under full age, and where the having held a particular employment, as that of a policeman, incapacitates for a certain time. If the argument adduced be correct, persons so incapacitated ought to be placed on the register, if the incapacity would be removed by lapse of time in the year, though they were incapacitated at the time of registration. No such contention has ever yet been made successfully, nor indeed could it be made successfully consistently with the case of *Powell* v. *Bradley*. (1)

KEATING, BRETT, and GROVE, JJ., concurred.

Decision affirmed.

Attorney for appellant: *J. R. Wood.*
Attorneys for respondent: *Aldrich & Thorne.*

DURANT, APPELLANT; WITHERS, RESPONDENT.

Nov. 18.

Parliament—Borough Vote—Payment of Rates—Composition—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *subs.* 4.

D. occupied premises under an agreement by which the landlord was to pay all rates. The rateable value was 10*l.* In May, 1872 (the May previous to the qualifying year), a rate was made at 8*d.* in the pound. The name of the owner and of D. the occupier both appeared in this rate, and the sum payable was carried out as 4*s.* 8*d.*, being a composition made by the landlord with the overseers. This sum was paid by the landlord in due time. But, it having been discovered that the composition was illegal, the landlord, of his own accord, in September, 1872, paid to the overseers an additional 2*s.*, to make up the full amount of the rate at 8*d.* in the pound:—

Held, that D. had not paid an equal amount in the pound to that payable by other ordinary occupiers, within s. 3, subs. 4, of the Representation of the People Act, 1867.

APPEAL from the decision of the revising barrister for the borough of New Windsor.

Benjamin Chandler Durant objected to the name of Henry Withers being retained in the list of persons entitled to vote, in respect of property occupied in the parish of New Windsor, in the election of a member for the borough.

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(1) 18 C. B. (N.S.) 65; 34 L. J. (C.P.) 67.

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An agreement had been entered into previously to the qualifying year between Withers and the owner of the house, that the poor-rates should be paid by the owner and included in the rent paid by the tenant. Previously to the qualifying year an agreement had also been entered into between the owner and the overseers of the parish, under 59 Geo. 3, c. 12, by which the owner was to pay a composition in respect of the poor-rates upon the house occupied by Withers.

In the rate made on the 2nd of May, 1872, the names of the owner and occupier duly appeared. In that rate the gross estimated rental of the house was stated to be 12*l.* 10*s.* and the rateable value 10*l.* The rate was 8*d.* in the pound; but no sum was entered in that column of the rate-book. In the next column, under the head "Amount of rate assessed upon and payable by the owner instead of the occupier, by virtue of the statute or statutes in that behalf," was inserted the sum of 4*s.* 8*d.*; and under the head "Total amount to be collected" was the same sum.

Under the last-mentioned agreement the owner had paid to the overseers, in respect of the rate of the 2nd of May, 1872, the sum of 4*s.* 8*d.*, being the full amount of the composition in respect of the rate upon the house. After this had been done, it was considered that the payment of the composition was insufficient, inasmuch as no such agreement for composition could legally have been entered into; it being provided by s. 23 of 59 Geo. 3, c. 12, that nothing in that Act should extend to give power or authority to assess the owner, not being the occupier, of any house, apartment, or dwelling in which the right of voting for the election of members to serve in parliament shall depend upon the assessment of the voter to the poor-rates, &c.; and the owner paid in the month of September, 1872, the sum of 2*s.*, that sum being, together with the 4*s.* 8*d.* previously paid by him as a composition, sufficient to make up an equal amount in the pound to that payable by other ordinary occupiers in respect of the rate made on the 2nd of May, 1872. The payment of the said sum of 2*s.* was made by the owner of his own accord.

It was contended on behalf of Withers that, under the above circumstances, the provision in the 4th subsection of s. 3 of 30 & 31 Vict. c. 102, was complied with.

It was insisted by the objector that that provision had not been complied with; and reliance was placed upon s. 30 of 2 Wm. 4, c. 45, which provides for occupiers claiming to be rated to the relief of the poor in respect of the premises occupied by them: and, further, reliance was placed upon s. 49 of 30 & 31 Vict. c. 102, which provides against corrupt payments of rates for the purpose of enabling a party to be registered as a voter.

The names of five other persons whose names and qualifications were set out in a schedule attached to the case were objected to under similar circumstances.

The revising barrister was of opinion that, under the circumstances, there had been a sufficient payment of the rate of the 2nd of May, 1872, to entitle Withers to vote; but that there was no evidence that the above-mentioned two sums of 4*s.* 8*d.* and 2*s.* had been paid by the owner corruptly or not bonâ fide; and that there was nothing to satisfy him that anything had been done contrary to the provisions of s. 49 of 30 & 31 Vict. c. 102. He accordingly retained the name of Withers and the names of the other five persons in the list.

If the Court should be of opinion that the decision was wrong, the list of voters was to be amended by expunging the names of Withers and of the other five persons.

Kingdon, Q.C., for the appellant. To entitle him to a vote as an occupier, s. 3, subs. 2, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), requires that the voter shall have occupied during the whole of the twelve calendar months preceding the 31st of July in the year of revision; subs. 3, that, during the time of such occupation, he shall have been rated in respect of the premises so occupied by him; and subs. 4, that he shall, on or before the 20th of July in the same year, have paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the premises up to the preceding 5th day of January. The case finds that Withers was not assessed to the May rate at all. He was not rated, nor had he claimed to be rated under s. 30 of the Reform Act, 2 Wm. 4, c. 45: and, assuming that a payment by the landlord under the agreement between him

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and his tenant was a payment by the latter, the last requirement of s. 3 of the Representation of the People Act, viz. the payment of an equal amount in the pound to that payable by other occupiers, was not satisfied,—the 4*s.* 8*d.* being a composition only (illegal, as the case finds), and the additional 2*s.* which was necessary to make up such equal amount, besides being a voluntary payment by the landlord, not having been paid until September.

Gorst, for the respondent. By his agreement with his landlord, Withers was entitled to have the rates legally assessable on the premises in his occupation paid by his landlord. By a mistake of the overseers (for which he is not responsible), the payment at first made was insufficient; but the proper amount was afterwards paid to and accepted by the overseers. The voter, therefore, has done all that he could to comply with s. 3, subs. 4, of the Representation of the People Act, 1867. The case does not find that he was not rated, or that he did not claim to be rated, which he might have done after the 1st of August.

KEATING, J. This is a very plain case. There has been no such payment of the rates as is contemplated by s. 3 of the Act of 1867. The 4*s.* 8*d.* was only a composition; and the additional 2*s.* was paid by the landlord voluntarily, when it was not properly payable by any one. The decision of the revising barrister must be reversed.

BRETT, J. The tenant was not assessed to the rate in question. Assuming that he was,—his name being inserted in the rate in conjunction with that of the landlord,—it was only for 4*s.* 8*d.* This sum the landlord paid. If that had been a full payment, though paid by the landlord, it would have enured as a payment by the tenant. It was not, however, an equal amount in the pound to that paid by other ordinary occupiers, but only a composition. The respondent clearly acquired no vote.

GROVE and DENMAN, JJ., concurred.

Judgment reversed.

Attorney for appellant: *Durant.*
Attorney for respondent: *C. T. Phillips.*

DURANT, APPELLANT; CARTER, RESPONDENTS.

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Nov. 21.

Parliament—Borough Vote—Residence—Occupation as Inhabitant—Reform Act (2 *Wm.* 4, *c.* 45), *s.* 27—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3—1 & 2 *Vict. c.* 106.

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The incumbent of a benefice claimed to be entitled to a borough vote in respect of the occupation by him of his rectory house. From the month of October till the month of June, 1873, in the qualifying year, the claimant had been absent from the house under the following circumstances. He obtained from the bishop a licence for non-residence from the 17th of May, 1871 up to the 31st of December, 1872, under 1 & 2 Vict. c. 106. He however retained possession of the house till October, 1872, when he left for the Continent, with the intention of returning in the following spring. He had arranged with a curate to serve the cure during his absence, and the curate obtained a licence from the bishop to officiate, and the bishop by such licence required him to reside, and assigned him the rectory-house as a residence. Upon the claimant's departure, the curate took up his abode in the rectory-house. By arrangement between them, three rooms in the house were retained by the claimant, and kept locked up, the key being left in the possession of a servant who had been employed by the claimant, but was, during his absence, employed by the curate. It was admitted by the claimant that he could not have returned to reside in the house without providing some other residence for the curate:—

Held, that there was no residence by the claimant, during the last six months of the qualifying year as required by 2 Wm. 4, c. 45, s. 27; and that he had not occupied as an "inhabitant" during the qualifying year, as required by 30 & 31 Vict. c. 102, s. 3; and consequently, that he was not entitled to a vote.

APPEAL from the decision of the revising barrister for the borough of New Windsor.

The name of the respondent had been duly objected to. The name appeared on the list, "Carter, T. T.: Rectory: House: Rectory."

The respondent had for some years been the rector of Clewer. In the year 1871, he petitioned the bishop of the diocese for a licence to be absent from his benefice.

On the 17th of May, 1871, the bishop granted a licence under 1 & 2 Vict. c. 106, s. 43, as follows: "We do hereby license you to be absent from your said benefice until the 31st day of December, 1872, on account of illness as medically certified unto us, you having provided for the due and proper performance of the duties of your benefice to our satisfaction." On the 18th of May, 1871, the bishop granted a licence to Mr. Edward Dunkin Harrison, to

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perform the office of stipendiary curate in the parish of Clewer, and by such licence assigned to him the yearly stipend of 100*l.* to be paid quarterly, for serving the said cure, and required him to reside in the parish. On the 7th of September, 1871, the bishop granted a licence to Sidney Malet Scroggs, to perform the office of stipendiary curate in the parish of Clewer; such licence concluded as follows: "And we do by these presents assign unto you the yearly stipend of seventy-five pounds to be paid quarterly, for serving the said cure, together with the use of the Glebe House (wherein we require you to reside), garden, and offices free from payment of any rent or taxes in respect of the same."

The respondent remained in possession of his house until some day in the early part of October, 1872, when he left the house and went abroad for the winter, with the intention of returning in the spring. Before leaving, he arranged with the bishop that Mr. Scroggs should be in the parish as an additional helper, and before the licence to Mr. Scroggs he had made an arrangement with Mr. Scroggs that he should be there as such additional helper.

The respondent had nothing to do with the application of Mr. Scroggs to the bishop for the licence. Before leaving, the respondent arranged with Mr. Scroggs that three rooms in the house should be retained by the respondent for his own use. Those three rooms were locked up and the key left in the possession of a servant who had been employed by the respondent, but who was paid by Mr. Scroggs after the respondent left the house. The respondent having left the house, Mr. Scroggs went to reside in it, and remained there till the month of June 1873. It was asserted by the respondent that Mr. Scroggs so resided in the house by his permission, and that if he had returned from abroad before the month of June, 1873, he could not have required Mr. Scroggs to leave the house unless he had provided some accommodation for him elsewhere.

There was no evidence before the barrister to show that Mr. Scroggs did not so reside in the house by the permission of the respondent, except such evidence as was supplied by the documents mentioned in the case. The respondent did not return to the house till the month of June, 1873, when he retook possession of the house. The respondent was rated for the house and paid the rates.

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It was contended on behalf of the respondent, that the residence and occupation were sufficient to entitle him to have his name retained on the list of voters. It was contended on behalf of the objector that the question rested entirely upon 1 & 2 Vict. c. 106, and that the licences were founded upon the said Act, and that under that Act it was impossible to make any reservation of rooms in the house.

The barrister was of opinion that there was proof before him that the respondent had occupied the house and, resided therein sufficiently to entitle him to vote in respect thereof, and that the provisions of the statute above referred to did not prevent him from being so entitled. He was also of opinion that, inasmuch as the licence granted to Mr. Scroggs was not shewn to have been granted under the provisions of the said statute, and did not, on the face of it or by reference, appear to have been made under the provisions thereof, and did not appear to be according to the terms of the said statute, he ought not to hold that the residence of Mr. Scroggs in the house was not, as alleged by the respondent, by his permission. He therefore retained the name upon the list of voters.

Kingdon, Q.C., for the appellant, was stopped by the Court, who called upon

Gorst, for the respondent. The claimant is entitled to make out his right to vote either under the Reform Act, by the occupation of premises of the requisite value for twelve months, accompanied by six months' residence within the borough, or under the Representation of the People Act, by the occupation as an inhabitant for twelve months. There was what amounted in law to an occupation by the respondent. The cases abundantly shew that in order to constitute occupation personal occupation is not necessary; a man may occupy by his furniture or his servant: *Rex* v. *St. Mary Kalendar* (1); *Daniel* v. *Coulsting* (2); *Rex* v. *Great Bentley* (3); *Reg.* v. *Mayor of Eye.* (4) With regard to the questions whether there was a six months residence or a twelve months inhabiting of the house by the respondent, which turn on

(1) 9 Ad. & E. 626.
(2) 7 M. & G. 122.
(3) 10 B. & C. 520.
(4) 9 Ad. & E. 670.

very similar considerations, it is contended that there was a constructive residence or inhabiting.

[BRETT, J. The respondent gave up the whole dominion over the premises to the curate.]

The occupation of the curate was in point of law permissive only. This question turns on the Pluralities Act, 1 & 2 Vict. c. 106.

[COLERIDGE, C.J. The bishop is given by the 93rd section of the statute power to assign the glebe house to the curate; to divest the rector of the dominion thereof and invest the curate with it.]

It is contended that, even if that be so, there was nothing here which amounted to such an assignment under the statute; the legal estate can only be assigned by a formal instrument of assignment.

[BRETT, J. There is no need for an assignment of the legal estate, but only of the legal possession.]

He can only assign for a certain period in the rector's absence; the moment the rector returns the right determines. The residence of the curate here was only by arrangement between the rector and himself and the bishop. All the bishop did was to sanction the arrangement, but the occupation of the curate was by virtue of the arrangement, and so permissive merely. The bishop only assigned the rectory house in the same way as he assigned the stipend, which was paid by the rector. The bishop only fixed the sum which was to be paid, but it was paid by virtue of the arrangement with the rector, and the house is occupied by virtue of the same arrangement. Mr. Carter had a right to return whenever he pleased, and to re-occupy the rectory house on finding other accommodation for the curate. The cases shew that if a man has the power to return and the intention to return whenever he pleases, he still has a constructive residence.

[KEATING, J. Could Mr. Carter have let the rectory house while he was absent to a third person?]

On the 31st of December, 1872, the power of the bishop to assign the house determined, because then the legal non-residence came to an end by the expiration of the licence. What took place after that must have been by arrangement entirely;

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so that the occupation then became permissive. [He cited the *Winchelsea Case* (1), *Lee's Case* (2), *Robinson's Case.* (3)]

COLERIDGE, C.J. I am of opinion that the decision of the revising barrister must be reversed. It appears from the case that Mr. Carter, having obtained a licence from the bishop to be absent from his benefice, and having also entered into the arrangement with Mr. Scroggs, described in the case, went away from his house with the intention of being absent until the spring. Mr. Scroggs, during his absence, occupied the glebe house, and that occupation was in accordance with the terms of the licence to Mr. Scroggs from the bishop. It is not proved that Mr. Carter was no party to the application by Mr. Scroggs, for the licence, in the sense that he knew nothing of it, or that it was made without his sanction; all that is found is that he had nothing to do with actually making the application. The question is, whether during the period that Mr. Scroggs actually occupied the house Mr. Carter can be said to have occupied or resided in it within the sense in which occupation and residence are necessary under the Reform Act, or occupation as an inhabitant is necessary under the Representation of the People Act. It is true that under the former Act an occupation, which is not residence, of the qualifying premises will suffice, but then there must be residence within the borough, or within seven miles thereof, for six months. I am of opinion that it cannot be contended even if there were an occupation sufficient to satisfy the terms of the Reform Act, which I am disposed to think there was not, that there was any such residence as is required by that Act. It is equally clear, as it appears to me, that there was no occupation as an inhabitant as required by the later statute. The claimant had been, for a considerable period during the twelve months preceding the 31st of July, abroad, and the bishop had, under the authority of an Act of Parliament, given to a curate the right to occupy the house during the non-residence of the rector. Not only was the rector not actually inhabiting, but another person had, under the authority of the law, and with his consent been put into the legal occupation. He admits that on returning again he could not dispossess Mr. Scroggs without previously finding him other accommodation. Under these circumstances it seems to me impossible to contend that he could be qualified under either of the Acts of Parliament relating to the franchise.

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(1) Glanville's Election Cases, 18. (2) Bar. & Aust. Election Cases, 12.
(3) Bar. & Aust. Election Cases, 335.

KEATING, J. I am of the same opinion. Mr. Carter may put his claim under the Representation of the People Act, as an inhabitant occupier, or under the Reform Act, as being qualified by occupation of premises of the requisite value and having resided for the specified period within the borough, or within seven miles thereof. It does not appear to me that he can succeed under either of the Acts. Under the later statute he must have been an inhabitant occupier for twelve months, and it appears to me clear that, whatever may be said as to occupation, there was no inhabitancy of the house for twelve months, inasmuch as for more than six months he was residing abroad. The same difficulty arises with regard to residence under the earlier statute. It appears to me that the question of residence under one statute is very much the same as the question of inhabitancy under the other. It is quite clear that corporeally Mr. Carter was not residing in the house. There are, no doubt, cases in which it has been held that a man may have more than one residence at a time. He may corporeally be residing at one place, and yet have a residence at another. He may have a place of residence to which he is free to go during the whole period. It was sought to bring the present within that class of cases by the suggestion that, if Mr. Carter had chosen to return, he would have had a right to go into his residence again, though he would, it is admitted, have had to provide other accommodation for his curate before he could do so. But even supposing that he had a right to determine the occupation by Mr. Scroggs, the answer is that he did not do so. Mr. Scroggs was in legal occupation of the house during the period for which he was licensed to hold it under the authority given by the Act of Parliament, and he occupied it, as it appears to me, not merely by permission of Mr. Scroggs, but under the authority of the licence. One test would be this: Could Mr. Carter have given permission to any other person to use the house during the period of his absence? I apprehend, clearly not. How then can it be said that there was a residence in the house by Mr. Carter?

Brett, J. On reading this case, I have very little doubt that the qualification was made to rest before the revising barrister upon the Representation of the People Act, 1867; and I must say I think it highly inconvenient, even if it be legal, when a case has been stated in reality as to one of the statutes, a qualification under the other should be relied on. There is no express finding here as to the value of the premises, nor as to whether Mr. Carter had any other residence within the borough, or within seven miles thereof, which there ought to have been if the case was to be put upon the Reform Act. However, I will not say that it might not possibly be open to Mr. Gorst to support his claim under that Act. In deciding cases in the revision courts with regard to such matters as this, questions of title are never tried. The case is to be tried in relation to the existing facts. In the present case, as it appears to me, all the parties assumed to act under the Pluralities Act. If they were not so acting, Mr. Carter could not have properly gone abroad. It was obvious that he went on the strength of the arrangement with his bishop, and it is stated that he went for the winter, with the intention of returning in the following spring. He arranged with Mr. Scroggs that he should in the meantime serve the cure, and for that purpose Mr. Scroggs came and resided in the house. Three rooms are stated to have been retained by Mr. Carter, but it is obvious that he did not leave the house on the footing that it was to be under his own control during his absence, and the services of the servant he left behind were transferred to Mr. Scroggs. Mr. Carter said that Mr. Scroggs resided in the house by his permission. But he did not mean and could not mean that he did so solely by his permission. Obviously he meant to assert that if Mr. Scroggs went into the house under the licence of the bishop, in point of law it was by his permission. He clearly assumed the existence of the bishop's licence, or else he could not have said that he could not require Mr. Scroggs to leave the house without providing him with other accommodation. It seems to me that all parties assumed that Mr. Carter's non-residence took place in due form and order, under the legal authority of the Pluralities Act, and that the occupation of Mr. Scroggs was by virtue of the licence. If so, it seems to me to be no objection that the terms of the statute were not strictly complied with. If it were necessary to prove that they were, it would be trying a question of title, which, as I said before, the revision courts never try with respect to such cases as the present. In point of fact, up to the month of June in the qualifying year, Mr. Carter was away out of his parish and the borough, residing abroad, by the leave of his bishop, which was assumed to be granted to him under the statute, and Mr. Scroggs was in possession of his house by virtue of the licence. Under these circumstances, can it be said that Mr. Carter was an inhabitant occupier for twelve months before the 31st of July? It is necessary that he should both occupy and inhabit. It is not necessary to determine whether this was an occupation: it was certainly not an occupation as inhabitant. It is true that when a person keeps the dominion over his house, and goes away for an indefinite time, with the intention of returning at an indefinite time, he may be considered as inhabitant of the house while he is not bodily within the house; but Mr. Carter goes away for a definite time on the ground, according to his own statement to the bishop, that he wishes to go away for such a period, because he cannot live in his house; and some one else, with his knowledge, is to reside there in his stead—such arrangement being a condition on which the leave of absence is granted to him. To say that under these circumstances he is constructively residing in the house while Mr. Scroggs is residing there under a legal authority, adversely to him in one sense, seems to me impossible. With respect to the Reform Act, it is true that a person may occupy without being an inhabitant. I decline to decide whether there was any occupation here, for residence for six months within the borough, or within seven miles thereof, is necessary under that Act, and the only residence set up here is residence in the house in which Mr. Scroggs resided; so that the same difficulty arises with respect to the case, viewed under the Reform Act, as arose under the Representation of the People Act. I am, therefore, of opinion that under neither of the Acts is the respondent qualified.

GROVE, J. I am of the same opinion. It seems to me, that, if we held that Mr. Carter had a sufficient residence here, we should be converting non-residence into residence. He left his house for the purpose of residing abroad for a definite period, while another person, with his knowledge, resided in his house under such circumstances that, if he had returned during such period, he could not have resumed his residence in his house without first getting another residence for such other person.

Decision reversed. (1)

Attorney for appellant: *Durant.*
Attorney for respondent: *C. T. Phillips.*

FORD, APPELLANT; PYE, RESPONDENT.

Nov. 21.

5 C.P.D. 601

Parliament—Borough Vote—Break of Residence—Reform Act (2 *Wm.* 4, *c.* 45), *s.* 27—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.

A clergyman claimed to be qualified to vote for a borough in respect of the occupation of a dwelling-house above the value of 10*l.*, in which he usually resided. He entered into an arrangement with another clergyman by which they agreed to exchange duties and residences for a certain period for the purpose of obtaining relaxation and a change of scene. In pursuance of this arrangement the claimant left his house and resided for two months, which included the last month of the qualifying year, at a distance of more than seven miles from the borough, in the house of the other clergyman, who came and resided during the same period in the claimant's house:—

Held, that there was a break of residence which prevented the claimant from being duly qualified.

APPEAL from the decision of the revising barrister for the city of Exeter.

Objection was duly made to the respondent's name being retained on the list of voters for the city.

The respondent was a clergyman residing within the city, and was incumbent of the district parish of Countess Wear, near the city, and had for some years past, except as after-mentioned, continuously occupied and resided in a house on the Topsham Road, within the city and district parish. The house was rented by him, and was of greater value than 10*l.* a year. In June, 1873, a clergyman named Tordiffe, who was vicar of Devizes, in the

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(1) See the next two cases.

On appeal to Ex Ch it was ordd, Ct being divided, that a new trial shd be had & no judt was given on the pts of law (see post 751) county of Wilts, more than seven miles from the city of Exeter, wrote to the respondent offering to change duties with him for the months of July and August, 1873, in order that they might each obtain for themselves and families change of air and relaxation in their duties. The respondent assented to this proposal, and a correspondence ensued by which it was arranged that the respondent and his family should during the two months reside in Mr. Tordiffe's vicarage, and Mr. Tordiffe should reside in respondent's house in the Topsham Road. It was further arranged that the respondent should take one servant with him, and leave the remainder in his house to wait upon Mr. Tordiffe and his family; and the respondent, at Mr. Tordiffe's request, engaged a boy for him to attend to a carriage which he took with him to Exeter. Similarly Mr. Tordiffe agreed to leave his servants to wait on respondent. There was no agreement between the parties other than was contained in the correspondence, and no payment was to be made by either of them to the other. The respondent paid the wages to his servants during the two months, and wrote once or twice during his absence giving directions to them as to their conduct.

The respondent's house being larger than was required by Mr. Tordiffe, he retained two rooms (a bedroom and dressing-room), these being either locked up or occupied by one of respondent's servants during his absence. They were not retained by respondent with any intention of using them while Mr. Tordiffe was staying in his house, but because they were usually occupied by an invalid sister who resided with him, and he was desirous that they should not be disturbed.

There was nothing to prevent the respondent's sleeping in these rooms if he had a right in law to return to his house during the two months; but he did not in fact do so, and never contemplated or intended using them for that purpose. The arrangement between Mr. Tordiffe and respondent was fully carried out, and the respondent returned to Exeter at the beginning of September, 1873. He had no residence apart from the house in the Topsham Road, within seven miles of Exeter.

It was urged on the part of the objector that the respondent had not occupied the whole of his house during July, 1873, and that he had not resided within seven miles of Exeter during the month of July, on the ground, first, that the agreement between Mr. Tordiffe and the respondent amounted to a demise of the premises; secondly, that Mr. Tordiffe was at least tenant at will of the house, and had complete control over the part occupied by him, and was not a lodger, so as to make his occupation in law the occupation of the respondent; thirdly, that the respondent's servants became Mr. Tordiffe's servants during the two months, and were bound to obey his orders, and therefore did not occupy the house on behalf of the respondent; fourthly, that the legal effect of the agreement between the respondent and Mr. Tordiffe was that the respondent was not entitled to return or live in his house during July and August without Mr. Tordiffe's consent, the rooms retained by him not having been retained for the purpose of residence, and not being capable of being so used by him without the use of other parts of the house; and fifthly, that the respondent, whether or not he had a legal right to return, having in fact abandoned all intention of returning to the house during the two months, and having allotted it to another purpose, did not reside there during the two months within the meaning of the Acts relating to the franchise.

The barrister retained the respondent's name on the register.

Kingdon, Q.C., for the appellant. In the present case there was clearly what amounted to a break of residence. The claimant cannot be considered as residing or as an inhabitant occupier during the month of July in the qualifying year, and therefore cannot be entitled to a vote. The transaction amounted to a demise of the house, but if not, it is sufficient that the respondent gave up possession to another person for a definite period, and went away, intending not to return during such period.

[He cited *Powell* v. *Guest*. (1)]

The respondent did not appear.

KEATING, J. I do not think that the decision of the revising barrister can be sustained. It appears to me clear that there was in this case a break in the residence of two months. The respon-

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(1) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69 10 Jur. N.S. 1238

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FORD v. PYE.

dent had voluntarily given up the possession of his house for good consideration to another person for that period, but whether the transaction amounted to a demise of the house seems to me to be immaterial. He had authorized another to occupy it for a certain definite period, and he himself not only did not return or reside there during such period, but he never contemplated doing so. It is clear that the definition of residence given in Elliott on Registration, 2nd ed. p. 204, and adopted by Erle, C.J., in *Powell* v. *Guest* (1), would exclude such a case as this. The mere fact of absence, as long as there is liberty of returning, and no abandonment of the intention to return whenever the person pleases, will not prevent there being a constructive residence; but if the person has deprived himself of the liberty of returning by letting the premises, or has abandoned the intention of returning, as in the present case, he cannot be said to have been residing. This view appears to me to be not only good law, but sound sense.

BRETT, J. I am of the same opinion. The respondent, as it appears to me, had given up the liberty, or at any rate the intention, to return to his house for two months. Even if he had reserved the liberty, as he had abandoned the intention to return, I think he cannot be said to have resided during such period.

GROVE and DENMAN, JJ., concurred.

Decision reversed. (2)

Attorney for appellant: *Elliott Fox.*

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(1) 18 C. B. (N. S.) 72; 34 L. J. (C. P.) 69. 10 Jur NS 1238

(2) See the preceding and the next case.

FORD, Appellant; HART, Respondent.

1873
Nov. 21.

Parliament—Borough Vote—Freeman—Residence—Reform Act (2 *Wm.* 4, *c.* 45), *s.* 32.

5 CPD 60,1
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The claimant, a freeman of a borough, was an officer in the army serving with his regiment. When he obtained leave of absence, which he usually did for three months in the year, he used to reside at the house of his mother, within seven miles of the borough, occupying apartments there, which were always reserved for his use. He was unmarried, and had no other home than his mother's house:—

Held, that in the case of an officer subject to the will and pleasure of the Queen, and who was therefore not sui juris, there could not be such an intention of returning as to constitute a constructive residence, and consequently that the claimant was not qualified.

Rex v. *Mitchell* (10 East, 511) discussed.

Appeal from the decision of the revising barrister for the city of Exeter.

Objection had been duly made to the name of the respondent being retained on the list of voters for the city of Exeter.

The respondent was a duly admitted freeman of the city.

He was, and had been for several years, an officer in the army, and, except when on leave of absence, was stationed with his regiment more than seven miles from the city of Exeter.

The respondent's mother, a widow, lived within seven miles of the city of Exeter, and previously to respondent's entering the army, and since he had been in the army whenever he obtained leave of absence from his regiment, he had lived with his mother in her house. The respondent had usually obtained leave of absence three months in each year, and was in fact living with his mother in Exeter during the three months of January, February, and March in the year 1873. His mother had set apart two rooms in her house, one being a sleeping apartment, for the use of the respondent, in which some of his clothes and other property remained while he was with his regiment, and no other person slept in or made any use of the rooms while he was away.

The rooms were so set apart for the exclusive use of the respondent during the whole of the six months preceding the 31st of July, 1873; and the respondent had during the whole of such

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time his mother's permission to occupy the rooms whenever he wished. He was not married, and had no home except the house of his mother and his rooms in the barracks at which his regiment was stationed for the time being.

It was objected that the voter had no residence within the borough, or seven miles thereof.

The revising barrister decided that the respondent continued to form part of his mother's family, and that he resided with her during the whole of the six months preceding the 31st of July, 1873.

The question for the Court was, whether, consistently with the facts above stated, the revising barrister could legally find the respondent to have so resided.

Kingdon, Q.C., for the appellant. There was no actual residence in the present case, and it is submitted that there was no constructive residence. The respondent could only return to his mother's residence by her permission, which might or might not be given on any particular occasion when he wished to return. He had, in fact, no settled home. The reason for requiring residence was, that the voter might have a substantial interest in the place, and a knowledge of its wants. Secondly, the respondent was an officer, and as such subject to the Queen's will and pleasure. He could not absent himself from his duties for any period of time without leave, and might be ordered anywhere for any length of time. He never had more than three month's leave of absence in a year. How is it possible under those circumstances to hold that he constructively resided for the last six months of the qualifying year in Exeter? *Rex* v. *Mitchell* (1) is distinguishable, because militiamen are not called out for more than a short period; and service is the exception, not the rule, of their lives. [He also cited *Bond* v. *Overseers of St. George's Hanover Square.* (2)]

The respondent did not appear.

KEATING, J. In this case I am of opinion that the decision of the revising barrister was wrong, and that the right to vote was not established. It seems to me, that according to the correct

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(1) 10 East. 511.

(2) Law Rep. 6 C. P. 312.

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rule of law with regard to residence to be derived from the authorities on the subject, the respondent had not resided for the six months prior to the 31st of July in the borough or within seven miles thereof. I am by no means disposed to say that in ordinary cases a residence such as existed in the present case, even though it is in some sense permissive, may not be a sufficient residence for the purpose of entitling a freeman to vote; but it seems to me that the position of the respondent was peculiar. Being an officer in the Queen's service he was no longer a free agent. He could not move about at his own will and pleasure or otherwise than according to the will of the Queen expressed through his superior officer. He could not return within the borough without the leave of his commanding officer. He has usually had three months' leave in a year, no doubt, but he might, under some circumstances, have none at all. He is no longer sui juris, and has voluntarily incapacitated himself from returning to his mother's house at his own pleasure. The case of *Rex* v. *Mitchell* (1) no doubt seems at first sight an authority in favour of the respondent; but the question there was, whether the persons claiming to vote could be said to be inhabitants under the charter of the borough. They had been absent, being in the militia; but they had houses in the borough in which their families resided during their absence. The Court held that they were inhabitants. The present, however, is a question of residence, and we must be governed in our decision by the decisions with regard to residence. I am not aware that there is any case in which it has been held that there can be constructive residence, when the party has voluntarily incapacitated himself from returning to the borough at his own will.

BRETT, J. I am of the same opinion. What is the effect of the rule laid down in *Powell* v. *Guest* (2) when applied to the present case? To constitute constructive residence, the claimant must have the liberty of returning and also the intention of returning whenever he pleases. Here the respondent was actually living, and sleeping, and doing all that constitutes residence more

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(1) 10 East, 511.

(2) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69.

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than seven miles from the borough at the barracks. Therefore he did not in fact reside at his mother's house. Then was there a constructive residence according to the rule laid down by Erle, C. J.? 5 C P D 61 I do not assent to Mr. Kingdon's argument that there was no such residence, because the mother might have withdrawn her permission. Such permission did, in fact, exist during the whole of the six months. But can it be said that there was an intention to return in the sense in which it is necessary to constitute constructive residence? When it is stated that the respondent is an officer of the army we must take notice of the law as applicable to such, viz. that though they do customarily get leave of absence, they cannot without the leave of the Queen, expressed through the commanding officer, be absent for a day. The respondent voluntarily put himself into the position of not being able to return to 5 C P D 64 the city of Exeter when he pleased. When the person in fact lives elsewhere, and cannot, by law, return to the borough without permission of another, it seems to me impossible to say that there is an intention to return within the meaning of the terms as applied to the doctrine of constructive residence. To make a comparison, which is perhaps hardly seemly as applied to an officer doing his duty in the Queen's service, but which aptly illustrates my meaning, it has been held that a man who commits an offence and thereby subjects himself to imprisonment, though no doubt he would be very glad to return to his former place of residence, yet, inasmuch as he has voluntarily placed himself under the circumstances which led to his restraint, cannot be said to have an intention of returning. (1) Thus, in the present case, not by crime, but by the voluntary acceptance of a duty, the respondent has incapacitated himself from returning to the city of Exeter. The only decision which raises any difficulty in my mind is *Rex* v. *Mitchell*. (2) But that arose upon different words from those which govern the present case. Here the question is, whether, under s. 32 of the Reform Act, there has been a sufficient residence. There the question was, whether there was a right to vote as an inhabitant under a charter. As I understand that case, it was held that on the proper construction of the charter a person might be an in-

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(1) See *Powell* v. *Guest* (18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69. 10 Jur NS 12

(2) 10 East, 511.

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habitant without dwelling in the borough. Inasmuch as he had his house and establishment there and his family, it was considered that he was what would be generally meant by an inhabitant, and would be commonly called so, and so was within the meaning of the charter. It does not appear to me that that case can govern the construction of the Act we are now considering.

DENMAN, J. My Brother Grove requested me to say that he agrees with the rest of the Court, but he thinks it very unsatisfactory to have to decide these questions without argument on both sides. (1) I also agree that the respondent cannot succeed. The authorities no doubt shew that there may be a constructive residence where there is no actual residence, but it seems to me that the residence attempted to be set up here does not amount to a constructive residence.

Decision reversed.

Attorney for appellant: *Elliott Fox.*

BOON, APPELLANT; HOWARD, RESPONDENT.

1874
Jan. 31.

Parliament—Borough Vote—Part of a House—Structural Severance—Separate Rating—Representation of the People Act, 1867 (30 *&* 31 *Vict. c.* 102), *ss.* 3 *and* 61.

Sect. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), enacts that every man shall be entitled to be registered as a borough voter who (subs. 2) "is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough;" and (subs. 3) "has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises." And the interpretation-clause (s. 61) enacts that, unless there is something in the context repugnant to such construction, the word "dwelling-house" shall include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

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(1) Grove, J., was present during the argument, but had left the court before judgment was pronounced.

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H., on the 31st of July, 1873, and for the preceding twelve calendar months, occupied part of a house in a borough, consisting of two rooms (not structurally separate from the rest of the house), in which he and his family entirely lived. These rooms were connected by a staircase and passage which were used by H. in common with the persons who occupied the rest of the house, the landlord not residing therein or retaining any control over the premises, but the tenants only having control over the outer door.

During the twelve months ending the 31st of July, 1873, two poor-rates were made, viz. one in November, 1872, the other in May, 1873. In both those rates the two rooms were rated separately from the rest of the house, and H. was rated in respect of them. The two rooms were not rated separately from the rest of the house in the rate made in May, 1872, which was the last rate made before the commencement of the year ending on the 31st of July, 1873.

At the time of the passing of the Representation of the People Act, 1867, there was no Act in force in the parish authorizing owners of houses to be rated instead of the occupiers:—

Held, by Keating and Denman, JJ., that the two rooms constituted a "dwelling-house" within ss. 3 and 61; and that H. was sufficiently rated in respect of them, notwithstanding the house was not separately rated in the rate made in May, 1872; for that s. 3, subs. 3, only required the occupier to have been rated in respect of the premises to all rates made during the qualifying year, and that the separate rating of part of a house in s. 61 had reference to this; and that therefore H. was entitled to be registered.

Held, by Brett and Honyman, JJ., that s. 61 contained a definition of what the thing occupied for the twelve months must be, viz. a part of a house separately rated; and, therefore, as the rooms had not been separately rated till the rate in November, 1872, H. had not occupied for twelve months the thing required.

Held, by Brett, J., that the rooms were not occupied as a separate dwelling within s. 61.

Stamper v. *Overseers of Sunderland* (Law Rep. 3 C. P. 388) discussed.

APPEAL from the revising barrister for the city of Exeter.

William Henry Boon duly objected to the name of George Howard being retained on the list of voters for the parish of All-hallows-on-the-Walls, in respect of his occupation of a dwelling-house.

Howard, on the 31st of July, 1873, occupied, and had occupied for the preceding twelve months, part of a house, consisting of two rooms, which were not structurally separate from the rest of the house.

The two rooms were connected by a staircase and passage, which were used by Howard in common with the persons who occupied the rest of the house.

Howard and his family lived entirely in these two rooms, sleeping and cooking and having their meals therein.

The landlord did not live on the premises or retain any control over them; but the other rooms in the house were let out in a similar manner to other tenants. (1)

Two rates were made in the parish during the twelve months ending the 31st of July, 1873, viz. November, 1872, and May, 1873; and in both those rates the two rooms were rated separately from the rest of the house, at the sum of 3*l.* 10*s.*; and Howard was rated in respect of them.

At the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), there was no Act in force in the parish authorizing the rating of the owner instead of the occupier in the case of small tenements; but it was usual, in the case of such tenements, for the owner to pay to the collector the rates instead of the occupier; and, where this was done, the overseers usually rated each whole house as one tenement, placing in the occupiers' column the name of one of the persons so occupying part of the house, and the words "and others" to represent the remainder of the occupiers,—the rating being the same as if the whole were joint occupiers of the whole house, instead of separate occupiers of different parts of it. It seldom happened that the occupier of a separate part of a house was separately rated for that part.

In consequence of an opinion expressed by the revising barrister when revising the lists of voters for the city of Exeter in the year 1872, that practice had been changed, and the overseers had separately rated the occupiers of parts of houses in respect of the parts occupied by them, except when such persons only occupied as lodgers.

The rooms occupied by Howard were not rated separately from the rest of the house at the time of the passing of the Representation of the People Act, 1867; but the owner was not rated for them instead of the occupier; and there was no evidence to shew whether they were or were not then occupied separately from the remainder of the house. Howard did not at that time occupy them.

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(1) It was agreed, upon the argument of the case, that there was an outer door to the house, over which the tenants only had control.

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The rooms were not rated separately from the rest of the house to the rate made in May, 1872, which was the last rate made before the commencement of the year ending the 31st of July, 1873.

It was contended on the part of the objector that Howard was not entitled to have his name retained on the list, for the following reasons:—

1. Because the rooms occupied by him were not structurally separate from the rest of the house:

2. Because the portion of the house occupied by him included the staircase and passage, and the staircase and passage were occupied by him jointly with the other tenants of the house:

3. Because, until the first rate made after the 31st of July, 1872, the rooms were not separately rated, and therefore they did not constitute a "dwelling-house" the occupation of which would qualify the voter during the part of the electoral year preceding the making of that rate:

4. Because, according to the decision of *Stamper* v. *Overseers of Sunderland* (1) and the judgment of Bovill, C.J., in *Thompson* v. *Ward* (2), the rooms ought not to have been separately rated, and the rating of them illegally by the overseers did not constitute them a "dwelling-house" within the meaning of the Representation of the People Act, 1867.

It was contended on the part of the voter,

1. That since, by the interpretation-clause (s. 61) of the Representation of the People Act, 1867, it is provided that any part of a house shall, if occupied as a separate dwelling and separately rated, constitute a dwelling-house, it was not necessary that the part occupied by the voter should be structurally separate from the rest, to render it a dwelling-house within the meaning of the Act:

2. That the two rooms constituted a separate dwelling, and were alone the subject of the voter's occupation,—the use of the stairs and passage being an exercise of an easement belonging to him in right of his occupation of the rooms:

3. That the separate rating required by the definition of a "dwelling-house" was a separate rating in the rates made during

(1) Law Rep. 3 C. P. 388.

(2) Law Rep. 6 C. P. 327.

the electoral year; and that a part of a house which was during the whole of the electoral year separately rateable, and which was in fact rated to all the rates made during the electoral year, fulfilled the condition required by the definition with respect to rating:

4. That the decision of *Stamper* v. *Overseers of Sunderland* (1) applied only to boroughs in which at the passing of the Representation of the People Act, 1867, the owner was rateable instead of the occupier under the provisions of the Small Tenements Act (13 & 14 Vict. c. 99) or local Acts then in force, and had no application to boroughs in which the common law with respect to rating was in force, and where therefore the parts of a house which were separately occupied could only fail to be separately rated through the neglect of the overseers:

5. That, whether the said two rooms ought to have been rated or not could not affect the voter's right to have his name retained on the list, such rooms having been in fact separately rated as required by the definition of dwelling-house in the Representation of the People Act, 1867.

The revising barrister held, as far as it was a question of fact for his decision, and as far as he was justified in so holding consistently with the facts above stated, that the two rooms were occupied by the voter as a separate dwelling-house, and were separately rated to the relief of the poor: and he decided that Howard was entitled to have his name retained on the list of voters; and he accordingly retained his name on the list.

The names of nineteen persons were objected to under similar circumstances.

The question for the opinion of the Court was, whether Howard was entitled to have his name retained on the list of voters.

Jan. 22, 26. *Lopes, Q.C.*, for the appellant, contended that the respondent had not been, during the whole of the twelve calendar months preceding the 31st of July, 1873, the occupier of a "dwelling-house" within s. 3, subs. 2, and s. 61 of the Act of 1867,—the rooms occupied by him not being structurally severed from the rest of the house, and the respondent not having been separately rated in respect of them during the whole of the qualifying year; that, assuming that the rate of May, 1872, was not *made* during the qualifying year, still it was by law payable by the respondent; that the qualification of the respondent was not simply the occupation of the two rooms, but the occupation of those rooms, plus something which he occupied in common with the tenants of the other rooms, viz. the passage and staircase; that he occupied the two rooms as a lodger, and so fulfilled all the requirements of s. 3, subs. 4; and that the rooms formed part of a house wholly let out in lodgings, and therefore not properly the subject of separate rating of the several occupiers, but such as the owner ought to have been rated for, according to the decision of this Court in *Stamper* v. *Overseers of Sunderland.* (1)

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(1) Law Rep. 3 C. P. 388.

He cited *Cook* v. *Humber* (2), *Henrette* v. *Booth* (3), *Cuthbertson* v. *Hains* (4), and *Brewer* v. *M'Gowen.* (5) But he mainly relied upon the judgments of Willes and Brett, JJ., in *Thompson* v. *Ward.* (6)

He further contended that the point had been decided in *Thompson* v. *Ward* (6), inasmuch as, the Court being equally divided, the decision of the revising barrister against the franchise stood, and it was not competent to the revising barrister to raise the question again.

Kingdon, Q.C., for the respondent, contended that the object the legislature had in view when framing ss. 3 and 61 of the Representation of the People Act, 1867, was, to extend the franchise to every occupier of a dwelling-house, or of a part of a dwelling-house, whether structurally severed or not from the rest of the premises, provided the occupier was separately rated to the relief of the poor in respect of the portion so occupied by him; that the respondent's occupation of the two rooms brought him precisely within the words and the spirit of those enactments; that the right to use the passage and staircase in common with the other tenants was a mere easement, and no part of the subject of his occupation; that the legislature must have been well aware of the difficult and

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(1) Law Rep. 3 C. P. 388.

(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 8 Jur NS 698

(3) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur NS 1293

(4) Law Rep. 4 C. P. 525.

(5) Law Rep. 5 C. P. 239.

(6) Law Rep. 6 C. P. 327.

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subtle questions which had been raised in *Cook* v. *Humber* (1), *Henrette* v. *Booth* (2), and other cases, as to "structural separation," and must be assumed to have intended to remove those difficulties by substituting "separate rating;" that the case shewed that the respondent was sufficiently rated, it being enough that his name should appear on all rates *made* within the qualifying year, and that he should have paid all rates payable by him in respect of the premises so occupied by him, and there being no suggestion that any rate made or in force during the qualifying year remained unpaid; that, comparing s. 27 of the Reform Act, 2 Wm. 4, c. 45, with ss. 3 and 61 of the Representation of the People Act, 1867, the words of which were very similar, *Flatcher* v. *Boodle* (3) was a distinct authority to shew that the respondent was duly qualified; that the words as to rating in s. 61 cannot be taken in their literal sense, because, strictly speaking, it is the occupier and not the subject of occupation that is rated; and that *Stamper* v. *Overseers of Sunderland* (4) was not a satisfactory decision, besides which the question there raised came before the Court on an appeal from quarter sessions, and not as a question of parliamentary franchise. Upon the main point, he relied upon the judgments of Bovill, C.J., and Keating, J., in *Thompson* v. *Ward.* (5)

Lopes, Q.C., in reply, pointed out that *Flatcher* v. *Boodle* (3) was decided before the Act of 1867, and upon an enactment differently worded. For a portion of the qualifying year, at all events, viz. from the 31st of July, 1872, until November, the respondent did not occupy the thing required by s. 61, viz. a part of a house in respect of which he was separately rated to the relief of the poor.

Cur. adv. vult.

Jan. 31. The following judgments were delivered:—

HONYMAN, J. In this case, which was an appeal against the decision of the revising barrister for the city of Exeter, I am of opinion that the decision is erroneous, and ought to be reversed.

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(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 8 Jur N.S. 698

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur N.S 1293.

(3) 18 C. B. (N.S.) 152; 34 L. J. (C.P.) 77.

(4) Law Rep. 3 C. P. 388.

(5) Law Rep. 6 C. P. 327.

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The question turns on the proper construction of ss. 3 and 61 of 30 & 31 Vict. c. 102.

It appears that the voter had been from the 31st of July, 1872, the occupier of two rooms in a house, which it was found by the barrister were not structurally severed from the rest of the house; such two rooms being connected by a staircase and passage used by the voter in common with the persons occupying the rest of the house.

The last rate made for the parish before the commencement of the electoral year beginning on the 31st of July, 1872, was made in the month of May, 1872; and in this rate the two rooms were not rated separately from the rest of the house. During the electoral year beginning on the 31st of July, 1872, two rates only were made, viz. one in November, 1872, and the other in May, 1873, and in those the two rooms were rated separately from the rest of the house, the voter being rated for them; so that in fact there was no separate rating of the premises from the 31st of July, 1872, to the month of November, 1872.

It was objected to the vote, among other things, that the qualification was insufficient, because, assuming that the two rooms constituted a dwelling-house within s. 61 of the Act of 1867, they had not been separately rated during the whole of the electoral year.

The revising barrister was of opinion that the voter was duly qualified, and retained the name on the list.

Before the Act of 1867, it had been settled by the decisions that the occupier of part of a house used, not as a counting-house, but as a dwelling, was not entitled to vote, unless the part of the house was so actually severed from the rest of the house as to be a house of itself: see *Cook* v. *Humber* (1); *Henrette* v. *Booth*. (2)

What, then, is the effect of the new Act? To ascertain this, we must look at s. 3. This section contains four subsections differently worded,—see *Cull* v. *Austin* (3),—and directed to different subjects. The 1st relates to the personal capacity of the voter; the 2nd to the subject-matter of occupation, and the length of it; the 3rd to the rating of the voter; and the 4th to the payment of rates.

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(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 6 Jur NS 698

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur NS. 1293.

(3) Law Rep. 7 C. P. 227.

The 2nd subs. requires that the voter should, during the *whole* of the twelve months preceding the 31st of July in any year, have been an inhabitant occupier of "a dwelling-house" within the borough. Now, the 61st section of the Act says that, unless there be something in the context repugnant thereto, the word dwelling-house shall include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Now, let us read that subsection of the 3rd section as if these words were incorporated in it, so as to see what the legislature intended to say should be a sufficient occupation, and it will read,—"has been, *during the whole of the twelve months preceding the* 31*st of July*, an inhabitant occupier of any dwelling-house, or any part of a house occupied as a separate dwelling and separately rated to the relief of the poor."

It has been argued that the object of the legislature in the 61st section was to do away with the distinction between a part of a house structurally severed from the rest, and one not so severed, provided it be occupied as a separate dwelling; and probably this was the intention; but it must be borne in mind that the legislature has further required that it should be separately rated; and it seems to me that, where the part occupied by the voter has not been separately rated during the whole of the electoral year, the voter has not for the whole twelve months occupied the thing described by the legislature.

It is clear that, before the Act of 1867, the voter had no sufficient qualification unless the rooms occupied by him had been structurally severed during the whole year; and it seems to me that, if the legislature intended to do away with the doctrine as to structural severance, their intention was to substitute for structural severance a separate rating for the same period.

It was contended on behalf of the respondent that it was impossible that part of a house used as a separate dwelling should be separately rated, as a house cannot be rated, the rate being imposed on the occupier, not on the house; but we must, if possible, read the 61st section so as to give some meaning to it; and this, I

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think, can only be done by reading the words as if they were, "*and the occupiers of which are separately rated.*"

If, however, it be true that the part of the house cannot be separately rated, the result would, I think, follow, that the voter is not in occupation of any such thing as that specified by the 61st section, and therefore is not the occupier of a dwelling-house within s. 3, subs. 2.

It was further contended for the respondent, that by s. 3, subs. 3, it was only necessary that *a voter* should be separately rated to all rates made during the electoral year, and that the 61st section only required the separate rating of the rooms to the rates to which it was necessary that the voter should be rated; but I think that so to hold would be to confound the definition of the thing occupied with the provision defining the rating of the voter, and that, though it may be enough within subs. 3 that the voter should have been rated to all rates *made* during the electoral year, it does not affect the provisions of the 2nd subs., as explained by s. 61, that the premises should have been the subject of a separate rating during the *whole* electoral year.

Unless I am right in this view, the consequence would follow that, if no rate be made in the borough within the electoral year, so that the voter himself need not be rated, the franchise would be acquired by the occupier of part of a house occupied as a separate dwelling, although it had not been separately rated at any time during the year; nay, more, supposing that the house had, before the electoral year, been jointly rated in the name of the owner, and that there has been no rate made during the electoral year, so that the rooms have never been separately rated at all, the franchise would be acquired without any separate rating, contrary to the language of s. 61.

As I think that on this ground the decision of the revising barrister is wrong, it becomes unnecessary for me to pronounce any opinion as to whether the rooms in question did constitute part of a house occupied as a separate dwelling, within s. 61, or whether, in consequence of the whole house being let out as mentioned in the case, we should be compelled by the construction put on s. 7 by this Court in the case of *Stamper* v. *Overseers of Sunderland* (1) to hold that the owner alone could be properly rated for the house, and consequently that the voter was disqualified, as not being properly rated.

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(1) Law Rep. 3 C. P. 388.

Denman, J. The appellant in this case had duly objected to the name of the respondent being retained on the list of voters for the city of Exeter. The case stated by the revising barrister found the following facts:—The respondent did, on the 31st of July, 1873, occupy, and had occupied during the preceding twelve calendar months, part of a house, consisting of two rooms, which were not structurally separate from the rest of the house. The two rooms were connected by a staircase and passage which were used by the respondent in common with the persons who occupied the rest of the house. The respondent and his family lived entirely in these two rooms, sleeping, and cooking, and having their meals there. The landlord did not live on the premises or retain any control over them; but the other rooms in the house were let out in a similar manner to other tenants. There was an outer door to the house, over which the tenants only had control.

Upon this state of facts, it was contended on the part of the objector that the respondent was not entitled to have his name retained on the list of voters,—first, because the rooms occupied by him were not structurally separate from the rest of the house,—secondly, because the portion of the house occupied by the respondent included the staircase and passage, and the staircase and passage were occupied by him jointly with the other tenants of the house, —thirdly, because, until the first rate made after the 31st of July, 1872, the said rooms were not separately rated, and therefore they did not constitute a separate "dwelling-house," the occupation of which would qualify the voter, during the part of the electoral year preceding the making of the said rate,—fourthly, because, according to the decision of *Stamper* v. *Overseers of Sunderland* (1), and the judgment of Bovill, C.J., in *Thompson* v. *Ward* (2), the said two rooms ought not to have been separately rated, and the rating of them illegally by the overseers did not constitute them a dwelling-house within the meaning of the Representation of the People Act, 1867.

The revising barrister held, *as far as it was a question of fact for his decision*, that the two rooms were occupied by the respondent as a separate dwelling, and were separately rated to the relief of the poor, and retained the name of the respondent on the list: and the question for the Court is, whether his name and those of nineteen other persons similarly circumstanced ought to be retained on the list.

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(1) Law Rep. 3 C. P. 388.

(2) Law Rep. 6 C. P. 327.

Though the argument upon the case involved the consideration of more than one statute and of several cases decided before the passing of 30 & 31 Vict. c, 102, I am of opinion that the decision of the questions raised upon this appeal depends entirely upon the construction to be placed upon three sections of that statute; and that previous statutes and cases are only important so far as they throw light upon the probable intention of the legislature in passing the enactments upon which the present case turns.

The first section to which our attention was called is s. 3 of the Act, which enacts as follows:—"Every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in parliament for a borough, who is qualified as follows, that is to say, 1. Is of full age and not subject to any legal incapacity; 2. Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; 3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises; and 4. Has, on or before the 20th day of July in the same year, bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of January: Provided that no man shall, under this section, be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house."

The first part of this section which it is necessary to discuss critically is subs. 2. This subsection is intended to secure, first, that the voter shall be the inhabitant occupier, as owner or tenant, of a dwelling-house within the borough, and, secondly, that his occupation shall not be one of a few weeks' or months' duration, but that it shall have extended over the whole of twelve months ending on the 31st of July in the year of registration. Taking the case of an ordinary dwelling-house wholly and exclusively occupied by one person, this is a clause easily understood and applied; and it is only when the word "dwelling-house" is contemplated under different circumstances from those that any real difficulty arises. It must, however, be here observed that this subsection relates wholly to the subject of occupation,—first, as to the thing occupied (the dwelling-house),—secondly, as to the kind of occupation (as inhabitant owner or tenant),—and, thirdly, as to the time of occupation (one whole year, &c.) requisite for the attainment of the franchise. It is a subsection wholly confined to the topic of *occupation*.

Then follows subs. 3, which is wholly confined to a second subject-matter or requisite of the franchise in question, viz. the *rating* of the occupier who has been already defined by subs. 2. This subsection requires that the above-mentioned occupier shall, *during the time of such occupation*, have been rated as an ordinary occupier in respect of the premises so occupied by him within the borough, *to all rates (if any) made for the relief of the poor in respect of such premises.*

A question has been raised in this case as to the extent and meaning of this requirement. In my opinion, this subsection merely requires the occupier in question to have been rated in respect of the premises occupied by him within subs. 2, to all rates made *after* the 31st of July in the year preceding the year of registration, according to the requirement of subs. 3.

It was contended by Mr. Lopes, on the part of the appellant, that this subsection required the rating of the respondent to the last rate made *before* the commencement of the qualifying year. But I can find nothing in this subsection to warrant me in so holding: and so to hold would, in my opinion, be inconsistent with several cases decided upon this subsection, in all of which the question has been whether the voter was rated to all rates made during the year, and not extended to an inquiry as to the rates made, *even in part*, before the commencement of the year: *Jones* v. *Bubb* (1); *Ainsworth* v. *Creeke* (2); *Cull* v. *Austin* (3):

(1) Law Rep. 4 C. P. 468.
(2) Law Rep. 4 C. P. 476.
(3) Law Rep. 7 C. P. 227.

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see also *Clarke* v. *Brown* (1), which decided, under a different enactment but in almost identical words, that, where *no poor-rate* was made within the time mentioned in the Act, the franchise was acquired by the voter.

The third head of qualification beyond occupation for twelve months of the qualifying tenement, and being rated to rates made during those twelve months, is that contained in subs. 4, viz. "has on or before the 20th July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates *that have become payable by him* in respect of the premises up to the preceding 5th day of January.

The words of this subsection have received judicial construction. In the case of *Abel* v. *Lee* (2) it was held that the words "all poor-rates payable by him" were not restricted to all poor-rates *made* during the qualifying period, but included a rate made in the June previous to the commencement of the qualifying year in which the voter was rated; and that excusal of such rate was not equivalent to payment: and I think it must be inferred that, even if he had not been separately rated to that rate, but by virtue of some statute had been *liable to pay it,* though originally made upon others, the same result would have followed. This subsection was again under consideration in the case of *Cull* v. *Austin.* (3) There, a rate in which the voter was rated was made on the 2nd of February, 1867, and was then payable by him. He had afterwards, without any application of his own, been excused by order of justices from the payment of this rate. It was again held that this excusal was not equivalent to payment, and that had the rate in question been one made between the 5th of January of the year preceding the qualifying year and the 5th of January of the qualifying year, and up to that time payable by the claimant, no vote would have been gained.

These decisions seem to me to apply only to the case of a person who has either been himself rated to some rate payable by him during the prescribed period, or to the case of a person from whom a rate has become payable by virtue of some statutory or other obligation, by reason of his occupation of the premises (though he may not be named in the rate), upon the neglect or default of some one else to pay: and not to include the case of a rate made upon others, and already paid. I can find nothing in the statute requiring the voter to get his name placed upon the rate-book in respect of rates made upon other persons before the commencement of the qualifying year, and paid by them.

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(1) Law Rep. 4 C. P. 500.

(2) Law Rep. 6 C. P. 365.

(3) Law Rep. 7 C. P. 227.

Before stating my opinion upon the more important and difficult question in this case, it will be as well to dispose of the objections raised to the vote, in respect of non-compliance with subsections 3 and 4 of s. 3. The facts have been already stated; and, first, as to subs. 3. It was contended that the voter had not been rated to all rates made for the relief of the poor during the qualifying period, because in a rate which had been made in the month of May, 1872,—which was the last rate made before the commencement of the qualifying year,—the rooms were not rated separately from the rest of the house, and that a rate so made remained a rate made in respect of the premises during part of the qualifying year, and, being made in respect of the qualifying premises, was a rate to which the respondent ought to have been rated.

I can find no authority for holding that, upon the true construction of this section, there is any necessity for the rating of the voter to any rates except those made during the year. The cases cited above seem to me to dispose of this objection so far as subs. 3 is concerned. I will, therefore, pass on to the objection raised upon subs. 4.

It was argued for the appellant, that, assuming the rate of May, 1872, was not *made* during the qualifying year, still it was payable by the respondent, and not paid by him to the extent and in the manner provided for by subs. 4. But it does not appear from the case that this objection was raised in this shape before the revising barrister; and no facts are stated from which it can be inferred that if this rate was in any sense payable by the respondent in respect of the premises, it remained unpaid during any part of the qualifying year either by him or anybody. It may consistently with the facts of the case have been fully paid by him, or the owner, or anyone, before the 20th of July, 1872. I think, therefore, that, assuming the respondent to have occupied a "dwel-

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ling-house," within the meaning of subs. 2 of s. 3, there is no ground for saying that he does not bring himself within both of the sub-sections 3 and 4.

I now come to the main question discussed in the case.

It was contended for the appellant that the respondent was not entitled to the vote, because he did not fall within the description of subs. 2, as a person who "was on the last day of July, 1873, and had during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of a dwelling-house within the borough." This objection was in fact a series of objections, some of them raising very difficult and important questions. In order to state these properly, it is necessary to refer to s. 61 of the Act, upon which the respondent and the appellant both relied, and which enacts that the word "dwelling-house" shall *include* "any part of a house occupied *as a separate dwelling*, and separately rated to the relief of the poor." It is also necessary to bear in mind the proviso at the end of s. 3, "that no man shall under this section be entitled to be registered or to vote *by reason of his being a joint-occupier* of any dwelling-house." The appellant contended that the respondent did not, under the circumstances of the case, occupy a dwelling-house; that, the premises occupied by him not being structurally severed from the rest of the house of which they formed part, *Cook* v. *Humber* (1) applied; that, if resort was had to s. 61, still the words of that section, "as a separate dwelling," were not complied with; that, even if the rooms occupied by the respondent could be considered a separate dwelling within s. 61, they were not a separate dwelling which had been separately rated to the relief of the poor during the *whole* qualifying year, and therefore subs. 2 had not been complied with; that the occupation of the respondent was a joint occupation of a dwelling-house, and therefore within the proviso of s. 3; that the respondent occupied as a lodger, and not as owner or tenant; and that the premises in question were part of a house wholly let out in lodgings, and therefore not properly the subject of a separate rateability of the occupiers of such lodgings or apartments, but such as the owner ought to be rated for, within the decision of *Stamper* v. *Overseers of Sunderland*. (2)

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(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

8 Jur N.S. 698

(2) Law Rep. 3 C. P. 388.

Mr. Lopes, in his argument for the appellant, relied mainly upon the judgments of Willes and Brett, JJ., in the case of *Thompson* v. *Ward* (1); but, inasmuch as the Court was there equally divided upon the question raised, it becomes necessary to consider the case as one of the first impression, and to look to the reasons given on both sides in the different judgments in that case, rather than to the result of it, which was merely an affirmance of the rejection of the vote by the revising barrister. In the present case the revising barrister has allowed the vote; and I do not think it would be reasonable to complain of that course having been taken under the circumstances.

The facts in *Thompson* v. *Ward* (1) are extremely similar to those in the present case, but not identical. The existence of an ash-pit, and a privy, and other conveniences used in common by the occupiers of the rooms inhabited, appears to have been a material consideration in inducing one member of the Court to hold that the *room* occupied by the claimant was not the whole subject-matter of occupation, and that therefore there was a joint and not a separate occupation in that case. In the present case, however, it appears clear that the only part of the house in respect of which the respondent was rated as for a "dwelling-house" was, the two rooms in which he dwelt; and the question is therefore much more distinctly raised, whether those two rooms could or could not constitute a "dwelling-house" for which a vote could be acquired. I am of opinion that they could, and that, it having been found by the revising barrister, so far as it was a question of fact for him, that they did, there is no ground for holding the contrary.

For the purpose of the present case, I think it may be conceded that the occupation of the rooms in question would not have conferred a vote, though all other requisites existed, as being the occupation of a "house" within the meaning of s. 27 of 2 Wm. 4, c. 45. But, in considering the meaning of ss. 3 and 61 of 30 & 31 Vict. c. 102, I think it must be borne in mind that extremely difficult questions had arisen as to what does constitute a house which would make it particularly desirable for the legislature to adopt some definition which would prevent the recurrence of similar difficulty, when the franchise was to be conferred for the

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(1) Law Rep. 6 C. P. 327.

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first time in respect of the occupation of a "dwelling-house," independently of its value.

It was, as it seems to me, entirely with the view of preventing similar questions to those which had arisen in *Cook* v. *Humber* (1) and other cases that the legislature introduced into the Act of 1867 the 61st clause, so far as it relates to the word "dwelling-house." The effect of *Cook* v. *Humber* (1) cannot be better stated than in the words of Brett, J., in *Piercy* v. *Maclean* (2): "All that *Cook* v. *Humber* (1) decides is, that the occupier of part of a house not structurally severed from the rest confers no vote, because house in s. 27 of 2 Wm. 4, c. 45, means a whole house." But, in deciding what was a *whole* house, questions of great doubt and difficulty arose; see *Henrette* v. *Booth.* (3)

After the most careful study of all the arguments used in that case, viz. *Thompson* v. *Ward* (4), and in the present, and of the very elaborate judgments in that case, I have come to the conclusion that the law and its application to that case as well as to this (and even à fortiori to this) cannot be more correctly stated than in the following passage from the judgment of Bovill, C.J., in Law Rep. 6 C. P. p. 363:—"Upon that question,"—whether the premises occupied by the claimant were a dwelling-house within the meaning of the Act,—"it seems to me that the legislature intended to make 'any part of a house,' as distinguished from a whole house (in the sense in which the term 'house' had been previously interpreted by the Courts), a sufficient subject of occupation, provided it was occupied for the purpose of a dwelling, and as a separate dwelling in the sense of the occupation not being a joint occupation with others of that particular part of the house, and provided there was a wholly independent occupation, as distinguished from that of a mere lodger, and the part of the house was separately rated. The room of the present claimant was part of a house, and the nature of his occupation in this case seems to me to fulfil the three conditions; and, it being found that he was separately rated, I am of opinion that he must, for the purposes of this appeal, be considered the occupier of a dwelling-house, and that his premises must be considered a dwelling-house within the meaning of the Act of Parliament."

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(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 8 Jur NS 698

(2) Law Rep. 5 C. P. 252.

(3) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur NS 1293.

(4) Law Rep. 6 C. P. 327.

This view of the matter disposes of several of the specific objections raised upon the construction of ss. 3 and 61. The objection founded upon the proviso at the end of s. 3 fails, because the "dwelling-house" here being the two rooms which the respondent solely occupies as a separate dwelling, there is no joint occupation in respect of the dwelling-house by reason of his joint occupation of something else, viz. the staircase and passage. The objection founded upon the want of structural severance also fails, because, according to the view of Bovill, C.J., which I adopt, that is not essential, provided there be a separate dwelling, separately and not jointly occupied. The objections founded upon the argument that the occupation was that of a lodger and not of a tenant also fail, if the words of ss. 3 and 61 are large enough, as I think they are, to include the case and to confer the franchise upon the respondent.

A more formidable argument remains. It was contended by the appellant that s. 61 itself, in defining the cases in which a "part of a house" shall be included in the word "dwelling-house," adds a limitation which is fatal to the respondent's case; for that it must be a "part of a house separately rated to the relief of the poor;" and that, if this limitation be read in, as it was contended it ought to be when applying s. 3, subs. 2, to the case of part of a house, it becomes clear that the "part of a house" which is to qualify as a dwelling-house, must not only have been occupied separately as a separate dwelling for the whole qualifying year, but must during that time have been separately rated; and that, inasmuch as the premises in question in this case had been separately rated *for the first time* in November, 1872, they did not come within the word "dwelling-house" by virtue of s. 61, but, on the contrary, were excluded by that very section.

I must own that I was at first much struck by this argument: but, on full consideration, I think it is unsound. The words relied upon in s. 61, it must be observed, are not strictly in an *interpretation* clause, but in a clause intended to include a particular subject-matter of occupation,—a part of a house,—under a word which might not otherwise, and often would not, have been held to

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include it. The clause does not say that "dwelling-house" shall *mean* "part of a house" wherever it is used in the Act, but that it shall include it, if occupied as a separate dwelling, and if separately rated. Under these circumstances, I do not think that the mode suggested, of reading the two clauses, 3, subs. 2, and 61, together would have the effect of putting the two enactments together, so as to do what the legislature intended. Subs. 2 contemplates an occupation of the qualifying tenement for twelve months as a sine quâ non of the franchise for a dwelling-house; but subs. 3, as has been already explained, does not absolutely require a separate rating during the whole twelve months, but only a rating to all rates made within the twelve months: and I think that the words of s. 61 are amply satisfied where the "part of a house" in respect of which the franchise is claimed has, during the whole twelve months, been occupied as a separate dwelling, and is during that period separately rated (or, more properly speaking, separately named in the rate as the subject-matter in respect of which its occupier is separately rated) to all rates made during the qualifying year, as is required in the case of "dwelling-houses" of any other kind. I think that the intention of the legislature was, in the language used in s. 61, merely to apply the word "dwelling-house" in s. 3 to the case of a "part of a house," where occupied as a separate dwelling, and where separately rated, as other dwelling-houses are required to be rated, for the purposes of the franchise, i.e. to all rates made during the qualifying year.

One further point was made by the appellant. It was said that the rooms occupied by the respondent were such that, according to the authority of *Stamper* v. *Overseers of Sunderland* (1), the owner ought to have been rated instead of the occupier. I greatly doubt whether this point was really open to the appellant. The respondent was in fact rated in respect of the rooms in question; and I think very great inconvenience would result if the revising barrister were to take upon himself in such cases, there being no appeal against the rate, to decide whether the claimant was properly rated or not; but I do not think that the case of *Stamper* v. *Overseers of Sunderland* (1) applies. In that case each occupier occupied one room only. The case found that a water-closet and

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(1) Law Rep. 3 C. P. 388.

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other conveniences were used in common by the occupiers of the house; and the Court drew the conclusion that the exception in s. 7 of the Act applied; for that the house was wholly let out as apartments or lodgings not separately rated, and therefore that the owner and not the occupier ought to be rated.

In the present case, the revising barrister has found, and that upon facts upon which I think he might reasonably find, that the rooms occupied were occupied as a separate dwelling; and he states that the overseers have separately rated the occupiers of parts of houses *in respect of the parts occupied by them*, except when such persons occupied only as *lodgers;* from which I think it must clearly be inferred that the revising barrister, so far as it was a question of fact for him, was of opinion that the present respondent was *not* occupying as a lodger. I think, therefore, that the objection taken under s. 7 of the Act fails, and that subs. 1 of that section applies, and the occupier was here properly rated.

For these reasons I am of opinion that the revising barrister was right in retaining the votes objected to, and that our judgment ought to be for the respondent.

Brett, J. I have been unable to prepare a written judgment in this case; but, as it is desirable that the matter should be disposed of, I proceed to state my views. The first material fact in the case seems to me to be that, at the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), there was no Act in force in the city of Exeter authorizing owners of houses to be rated instead of the occupiers. The claimant is stated in the case to have occupied "part of a house, consisting of two rooms which were not structurally separate from the rest of the house." That seems to me to be a conclusive finding that the whole building was a house, and that what the claimant occupied was part of a house. He occupied two rooms, in which he and his family lived entirely, sleeping, and cooking, and having their meals therein; that is to say, the claimant in one sense lived entirely in these two rooms. The next paragraph in the case states that the landlord did not live on the premises or retain any control over them; but the other rooms in the house were let out in a similar manner to other tenants. The case further states that

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the two rooms were connected by a staircase and passage which which were used by the claimant in common with the persons who occupied the rest of the house. It is obvious, therefore, that, when it is said that the claimant and his family lived entirely in these two rooms, it is not meant to say that they used no other part of the house than the two rooms. They must use the staircase and passage; and these they used in common with the other tenants. It was agreed, on the argument, that there was an outer door to the house, over which the tenants only had control. The result therefore is, that the landlord did not reside upon the premises or exercise any control over it; but that the whole house was let out in separate apartments to several tenants, all of whom used the passage and staircase in common.

The next material statement in the case is, that two rates were made in the parish during the twelve months ending the 31st of July, 1873, viz. in November, 1872, and May, 1873, and in both these rates the two rooms in question were rated separately from the rest of the house. The case goes on further to state that there was a former rate made in May, 1872, which was the last rate made before the commencement of the year ending the 31st of July, 1873, in which the rooms in question were not separately rated. If we can infer anything from these statements, it is that the rooms were rated in the usual manner, viz. that the whole of the occupiers were rated in respect of the whole house in the name of one of them "and others."

Upon these facts, notwithstanding that they are the same as those in *Thompson* v. *Ward* (1), where the ruling of the revising barrister was against the claim to vote, the revising barrister in this case thought fit to hold that the two rooms were occupied by the voter as a separate dwelling-house, and were separately rated to the relief of the poor, and that the claimant was entitled to be registered; and the question is whether that decision is right.

The first point made is, whether the occupier of these rooms could be separately rated. It was argued that the revising barrister cannot look behind the rate, and that, if not appealed against, the rate is binding although the overseers had no legal power to make a separate rating of the several rooms. I must confess this is the

(1) Law Rep. 6 C. P. 327.

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first time I have heard that argument put forward. As far as my experience goes, the revising barrister has always looked behind the rate to see whether or not the party was properly rated. If it were otherwise, it would be in the power of the overseers to give or to withhold the franchise at their pleasure. I therefore think it is necessary for us to look behind the rate, to see whether or not the occupier of these two rooms could be separately rated; and that depends upon the true construction to be put upon the Representation of the People Act, 1867.

Before I proceed to consider that matter, I will venture to state again the canon of construction which, with the concurrence of the other judges, I propounded in *Cull* v. *Austin.* (1) "The governing rule with regard to the construction of all statutes by a Court of law administering the law, is, that the Court is bound to construe them as nearly as possible according to the ordinary received meaning of the words and ordinary grammatical construction of the phrases and sentences used in them. The Court ought not in any case to depart from such ordinary sense and ordinary grammatical construction, unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the legislature." It should seem that this rule ought to be adhered to more strictly, if possible, in the construction of the Act under consideration than in that of any other statute; for, the matter must have been discussed by persons who entertained the most earnest views upon the subject, and who were not likely to fail to express what they intended to convey. The best course, therefore, it still seems to me, is, to follow as nearly as possible the words of each clause.

It is said that absurdity would arise from following the language of each of the sections of this Act literally. The matter is thus dealt with by the late Mr. Justice Willes in *Abel* v. *Lee* (2), where that very learned judge says: "No doubt, the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy, or injustice. One recognises that rule where the repugnance arises between the words of the section and those of some other section in the same Act, or in some other Act which is in pari materiâ with it. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable." It seems to me, therefore, that the proper canon of construction for this statute is, to abide as nearly as may be to the precise words of each section and of every part of every section of it. I also think that one of the most important duties of this Court, whose jurisdiction over this particular subject is exclusive, and whose decisions thereon are final, and whose personality varies from time to time, is, to follow loyally, as I once ventured to express it (1), all the preceding decisions, and that the action of the Court in its exercise of this jurisdiction will be much impaired if this be not steadily kept in mind.

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(1) Law Rep. 7 C. P. at p. 234.

(2) Law Rep. 6 C. P. at p. 371.

Now, before the passing of the Representation of the People Act, 1867, there were two distinct sets of circumstances in parliamentary boroughs with regard to rating. There were parliamentary boroughs where statutes were in force under which in certain cases the owners of houses were rated instead of the occupiers; and there were boroughs in which no such statutes were in force. In the latter case, the owner might be rated, provided he occupied any part of the premises; or, if the whole house were let to separate tenants, as here, then, according to the decision of this Court in *Stamper* v. *Overseers of Sunderland* (2), the several occupiers might be rated under the statute of Elizabeth; and, if the occupiers were rated, they might be rated in either of two ways, that is to say, either jointly for the whole house, or separately in respect of the several apartments occupied by them respectively. So, in parliamentary boroughs where the Small Tenements Act (13 & 14 Vict. c. 99) was in operation, the owner might be rated, and to the full rate, provided he occupied part of the house, the same as any other occupier might be, and the owner and the tenant might be jointly rated, or the owner only. But there was another way in which the owner might be rated instead of the occupier, although he did not occupy any part of the premises himself, viz. under an order of the vestry, and in that case it was for a composition rate only.

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(1) In *Webster* v. *Ashton-under-Lyne, Orme's Case*, Law Rep. 8 C. P. at p. 299.

(2) Law Rep. 3 C. P. 388.

That being the state of things as to rating at the time of the passing of the Representation of the People Act, 1867, the provision contained in s. 7 of that Act was introduced into it. A particular interpretation was put by this Court upon that section in *Stamper* v. *Overseers of Sunderland.* (1) Mr. Kingdon has observed that the decision in that case was not satisfactory, and that, at all events, it was not an authority in the present case, because it was only an appeal against a rate. It is true it was an appeal against a rate: but it is manifest that the question was raised as a question of parliamentary franchise, and it was so treated by all the judges who took part in the decision; and therefore it would not be loyal to disregard it merely because it was not in form a case reserved by a revising barrister. The real decision there, as to the interpretation of s. 7 of 30 & 31 Vict. c. 102, was that the enactment in that section that, "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate," was to be treated as an exception to the former part of the section of something which otherwise would have been within it. Now, the former part of the section is a negative as well as an affirmative enactment. The first subsection provides that, "after the passing of this Act, no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough,"—which, by the interpretation-clause, s. 61, means all parliamentary boroughs,—"shall be rated to the poor-rate instead of the occupier," —which in *Stamper* v. *Overseers of Sunderland* (1) was held to refer to rating by way of composition,—"except as hereinafter mentioned." Then comes an affirmative enactment,—"The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book." Unless the case be one to which the former part of the sentence in subs. 1 can be applicable, the exception to it cannot apply, and therefore it would seem to follow that s. 7 cannot be applied to any parliamentary borough in which at the time of the passing of the Representation of the People Act, 1867, there was no statute in force by which the owner could be rated. If I differed from *Stamper* v. *Overseers of Sunderland* (1), I should still adhere to it. But I entertain a firm conviction that the decision in that case was right. It follows, therefore, that neither the 7th section of the Representation of the People Act, 1867, nor the case of *Stamper* v. *Overseers of Sunderland* (1) applies to the present case, and consequently that the occupiers of these rooms could legally have been separately rated.

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(1) Law Rep. 3 C. P. 388.

The next point is, whether the occupier of these two rooms, assuming that he might have been and was separately rated to all rates made for the relief of the poor, can be considered to fulfil the condition as to rating given with reference to the definition of "dwelling-house" in s. 61 of the Representation of the People Act, 1867. This part of s. 61 was naturally and necessarily contrasted with s. 3. It becomes necessary, therefore, to see what is the true construction of s. 3. It is divided into four subsections, the last three of which are those which are material for the present purpose. By subs. 2 it must appear that the voter "is, on the last day of July in any year, and has during the whole preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough." It is obvious that the occupation of the dwelling-house must have existed during the whole twelve months. The 3rd subsection is, "has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises." The 4th subsection is, "has on or before the 20th day of July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of January." Now, an interpretation has been put upon that subs. 3 in the cases of *Jones* v. *Bubb* (2), *Abel* v. *Lee* (3), and *Cull* v. *Austin*. (4) In those cases this Court came to the conclusion that, so far as subs. 3 is concerned, the voter need only be rated to such rates as were made during the qualifying year, and that he need not have been rated

(1) Law Rep. 3 C. P. 388.

(2) Law Rep. 4 C. P. 468.

(3) Law Rep. 6 C. P. 365.

(4) Law Rep. 7 C. P. 227.

to any rate made before the commencement of the qualifying year. In the first of these cases, where the rate was signed by the overseers before but not allowed by the justices until after the commencement of the qualifying year, it was held that the voter need not be rated to it, the words of subs. 3, "all rates made" during the time of such occupation, meaning all rates *completely* made within the year of occupation. In *Abel* v. *Lee* (1), the claimant had been rated in a rate made before the commencement of the qualifying year, from the payment of which he had been excused by the justices under 54 Geo. 3, c. 170, s. 11, during the qualifying year; and this Court, having only in that case to consider subs. 4 of s. 3, came to the conclusion that it differed from subs. 3, because it was not in terms limited to the preceding twelve months; and they held themselves bound to follow the exact words of subs. 4, and accordingly decided that, inasmuch as the claimant had not "on or before the 20th day of July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that had become payable by him in respect of the premises up to the preceding 5th day of January," he was not entitled to be upon the register. In *Cull* v. *Austin* (2), the claimant had been rated to several rates made both before and after the commencement of the qualifying year. He had paid all the rates that were payable by him during the qualifying year; but he had, four or five years before, been excused by the justices from the payment of a rate which had been imposed upon him in respect of the premises; and it was contended, upon the authority of *Abel* v. *Lee* (1) that he could not be qualified unless he paid that rate also. But the Court, after anxious consideration, came to the conclusion that it was not necessary that the claimant should, in order to qualify him as a voter, have paid that rate, but that it was enough that he should have paid all the rates which were payable by him in respect of the premises during the twelve months previous to the 5th of January in the qualifying year. It seems to me, therefore, that these cases have decided that there is a difference between the 3rd and the 4th subsections of s. 3 of the Representation of the People Act, 1867; that subs. 3 applies only to the question of the claimant being rated; and that subs. 4 applies to the rates which must be *paid* by the claimant. The

(1) Law Rep. 6 C. P. 365.

(2) Law Rep. 7 C. P. 227.

conclusion I have come to is, that, if the decision of this case had depended upon s. 3 alone, there is nothing upon the face of it to shew that the claimant was not entitled to be registered, because, with respect to the rate made before the commencement of the qualifying year, for anything that appears, the claimant may have been, and he must be taken to have been, separately rated in respect of the premises occupied by him, and (somewhat strangely) there is no finding in the case that the former rate had not in fact been paid by him. Therefore, irrespectively of the kind of occupation necessary to satisfy the definition in s. 61 of the statute, there is nothing to shew that the claimant might not have satisfied all the requirements of the Act in respect of rating.

Now, what is the meaning of s. 61 as to the definition of a "dwelling-house?" The words are, "*Dwelling-house* shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Obviously, two things are necessary to make that which ex hypothesi is not a "dwelling-house," but only a part of one, a dwelling-house within the statute. It must be separately occupied as a dwelling, and it must be separately rated to the relief of the poor. It was observed by Mr. Kingdon that these words cannot be taken in their literal sense, because strictly speaking a house or a part of a house cannot be rated, but the occupier is rated in respect of his occupation. That is strictly true: but the expression is commonly used, and has a known meaning. Then, if that definition be read into subs. 2 of s. 3, that subsection would, in the cases to which the definition of "dwelling-house" in s. 61 would be applicable (for, it is only in certain cases, that is to say, where what has been occupied is *part* of a dwelling-house, that the definition is required), stand thus,—"Is, on the last day of July in any year, *and has during the whole of the preceding twelve calendar months been*, an inhabitant occupier, as owner or tenant, of any part of a house within the borough occupied as a separate dwelling *and separately rated to the relief of the poor*." The definition is to stand in the place of the thing occupied; and, as that must be an occupation of the whole of that thing during the whole of the year preceding the last day of July, it follows that, according to the grammatical construction of the words, the whole, including the separate rating, must have existed during the whole year. That was pointed out by Montague Smith, J., in *Stamper* v. *Overseers of Sunderland* (1); and, following his view of the matter, and the rule of construction before laid down, I am of opinion that it is not open to the Court to say that "rated" means "liable to be rated," or that it does not mean that the rating shall have been during the whole of the qualifying year. It may be that this construction may lead to an insensible conclusion. Following the example of the late Mr. Justice Willes in *Thompson* v. *Ward* (2), I decline to decide whether it will do so or not. I decline to say that the statute means any other than what it says. I think it was necessary that the person occupying these rooms should have been separately rated in respect of them during the whole of the qualifying year; and on this point I agree with my Brother Honyman that, for this year at least, the claimant is not entitled to be put upon the register.

But, with regard to the remaining point, after having anxiously considered whether the view I took in *Thompson* v. *Ward* (3) was right or not, I find myself unable to alter the conclusion I there came to. Upon reading it again, and reading with the utmost attention the judgments of all the judges who took part in the decision of *Stamper* v. *Overseers of Sunderland* (4), and more particularly that of Sir Montague Smith, it seems to me to be clear that every one of them was at that time of opinion that the 61st section of the Representation of the People Act, 1867, had no effect upon the decision of this Court in *Cook* v. *Humber.* (5) I think it must come, either to what the late Mr. Justice Willes said in *Thompson* v. *Ward* (6), viz. that the 61st section has no effect at all on the meaning of "dwelling-house," but leaves the matter as it stood before the passing of that Act, and, when it applies, it applies only to the case of chambers in the Inns of Court, or to flats, as in Victoria Street (7), and that, where the occupation is such as in the present case, it does not apply at all,—or to what I myself said in *Thompson* v. *Ward.* (3) After all the consideration

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(1) Law Rep. 3 C. P. 388, 403.

(2) Law Rep. 6 C. P. at p. 344.

(3) Law Rep. 6 C. P. at p. 332.

(4) Law Rep. 3 C. P. 388.

(5) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 8 Jur N.S. 699

(6) Law Rep. 6 C. P. at p. 352.

(7) As to these, see the observations of Brett, J., in *Thompson* v. *Ward*, Law Rep. 6 C. P. at p. 335.

I have again given to the statute, I adhere to what I said in that case, and am of opinion that, even if the rating was for a sufficient period, the claimant is not entitled to the franchise, on the ground that part of what he used as a dwelling he used in common with the other occupiers. I therefore think the decision of the revising barrister was wrong.

Keating, J. I also have been unable to write a judgment in this case. It was, however, less necessary to do so, inasmuch as substantially I agree with the judgment delivered by my Brother Denman. Still, there are one or two circumstances connected with the case to which I should wish shortly to refer. The inconvenience which has resulted from the present state of the decisions upon the main point involved in this case, is much to be regretted.

Before the passing of the Representation of the People Act, 1867, there was no dispute that the franchise in respect of occupation could not be obtained except by the occupation of a *whole* house. The 27th section of 2 Wm. 4, c. 45, gives the vote in respect of a "house," which, according to the decisions, meant a whole house. What constituted a whole house was from time to time the subject of much discussion: but nobody doubted that the qualification must be a whole house. That discussion gave rise to the doctrine of "structural severance,"—a doctrine the most unfortunate that ever was broached. No one can doubt that who looks at the very elaborate judgment of Erle, C.J., in *Cook* v. *Humber*. (1) That very eminent judge thought he had accomplished the definition of "structural severance." But, if any lawyer reads that case and the subsequent case of *Henrette* v. *Booth* (2), and can reconcile the two decisions, I must confess that he has more acuteness than I possess. It is notorious that the subject has occupied the attention of the Court as much as any that has ever been agitated.

Then came the Representation of the People Act, 1867. It is not disputed that that Act intended to give the franchise to the occupiers of something different from a whole house. I entirely agree with my Brother Brett in the canon of construction which he lays down. Applying that here, it seems to me that, when the legislature say that the franchise may be acquired by the occupation of part of a house, they must mean something different from a whole house. It is with much diffidence and hesitation that I dissent from the view taken by the late Mr. Justice Willes in *Thompson* v. *Ward.* (1) But I prefer adhering to the words of the Act. The subject of occupation to confer the franchise must be separately occupied and separately rated. The legislature intended that if the occupier of part of a house has been separately rated for a given time and has paid the rates, he shall be registered. It must be presumed to have been known to them that houses which are let out in separate apartments must have a common staircase. Mr. Lopes has contended that if the claimant uses anything in common with other tenants, he does not separately occupy a part of a house. I must confess I am unable to follow that argument. I see nothing in the Act to warrant the inference that a man cannot occupy separately a room or rooms merely because he uses the staircase in common with others. He occupies the rooms, not the staircase. His user of that in common with the other tenants cannot interfere with his rights as the occupier of part of a house. If it be necessary that the occupation should be so separate and distinct that there shall be nothing used in common, what would become of the franchise in the vast majority of cases?

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(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. 8 Jur N.S. 699

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur N.S. 1293

Then, the claimant must be separately rated. I suppose we may assume that, though this particular parish was not under the operation of the Small Tenements Act at the time of the passing of the Representation of the People Act, 1867, the greater part of England was. As I read the case of *Stamper* v. *Overseers of Sunderland* (2) it amounts to this, that no man can be separately rated for part of a house in any place in which, at the time of the passing of the Representation of the People Act, 1867, the Small Tenements Act, 13 & 14 Vict. c. 99 (or some local Act to the same effect), was in force. If so, what becomes of the franchise? You shall have the franchise if you separately occupy a part of a house and are separately rated in respect of it: but, if neither be prac-

(1) Law Rep. 6 C. P. 327, 343.

(2) Law Rep. 3 C. P. 388.

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ticable, what becomes of the franchise? If the legislature meant that the party could not be separately rated in respect of his occupation of part of a house unless the subject of occupation had been separately rated at the time of the passing of the Representation of the People Act, 1867, upon whom is the franchise conferred? I must confess I do not see my way to a solution of the difficulty.

With reference to the construction of "dwelling-house," in subs. 2 of s. 3 of the Representation of the People Act, 1867, I agree with that put upon it by my Brother Denman; and I also agree that the words "and separately rated to the relief of the poor," in s. 61, are to be read along with subs. 3 of s. 3, which applies to rating, and not merely with subs. 2, which applies to occupation. I feel the full force of what has been said by my Brother Brett, and which had been very forcibly put before by the late Mr. Justice Willes in *Thompson* v. *Ward* (1), that, if the legislature says a thing shall be so and so, we are bound to give effect to it. But I hold it to be an essential canon of construction, that, if the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail. I cannot see that any violence will be done by reading the words of s. 61, "and separately rated to the relief of the poor" (which it is conceded is an inapt mode of expression), as if they were "and the occupier of which is separately rated to the relief of the poor in respect of such separate occupation." Therefore I quite agree with the view taken by my brother Denman of that section.

With respect to the case of *Stamper* v. *Overseers of Sunderland* (2), I agree with my Brother Brett that this case is excepted out of it by reason of the Small Tenements Act not having been applied to the city of Exeter at the time of the passing of the Representation of the People Act, 1867. I find that that case has excited considerable discussion. Mr. Davis, in his book on the Law of Registration and Elections, at p. 234, discusses that case, and expresses his regret (in which I entirely concur) that the Court felt bound by the language of s. 7 of the Representation of the People Act, 1867, to hold as they did. "It seems a pity," he says, "that the Court could not see their way to holding that the exception applied to a state of things whenever it might exist and so long as it existed, and that this state of things should be the fact of a dwelling-house, in its ordinary sense, being wholly let out as described, and not in fact separately rated, although it may be separately rateable, that, in such a case, and so long as there should be no separate rating, the owner should be rated (i.e. should be rateable), and could not object to the particular rate; but leaving the overseers to rate separately if they thought fit, or the tenants to demand to be rated if they could establish the right to be separately rated." It is not, however, necessary upon the present occasion to examine critically the reasons for that decision. Should it ever come under consideration again, it may be a question how far this Court, whose jurisdiction as to registration matters is exclusive, may hold itself to be irrevocably bound by that case to its full extent. I quite agree with my Brother Brett that the judges who decided that case had their attention expressly called to the consequences to which it might lead in cases under the Registration Acts.

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(1) Law Rep. 6 C. P. at p. 343.

(2) Law Rep. 3 C. P. 388.

As to the question of rating, I cannot say that the case has been at all improperly stated. I assume that the revising barrister was satisfied that all the rates which the parish officers were entitled to receive in respect of these premises had been paid; and therefore it was not necessary for him to state more upon the subject than he has stated. Nor do I think that the revising barrister was precluded from exercising his judgment on the case of *Thompson* v. *Ward* (1), seeing that there was no decision of this Court, though, for myself, I must say I adhere to the opinion which I there expressed.

Upon all the other points, I fully adopt the judgment delivered by my Brother Denman.

DENMAN, J. With regard to *Stamper* v. *Overseers of Sunderland* (2), I wish to add that I entirely agree with my Brother Brett that that case does not apply where the Small Tenements Act was not in force at the time of the passing of the Representation of the People Act, 1867.

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(1) Law Rep. 6 C. P. 327.

(2) Law Rep. 3 C. P. 388.

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Honyman, J. I also would add that I must not be taken as disagreeing with the judgment of my Brother Brett on the points on which I have not touched.

Keating, J. The Court being equally divided, the appeal drops; and, following the precedent in *Thompson* v. *Ward* (1), there will be no costs.

Attorney for appellant: *Geo. G. Philbrick.*

Attorneys for respondent: *Coode, Kingdon, & Cotton, for Flood, Exeter.*

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(1) Law Rep. 6 C. P. 327.

END OF REGISTRATION CASES,*

AND OF

HILARY TERM, 1874.

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* *Edmonds* v. *Alsop*, an appeal from the revising barrister for the city of London, was argued in Michaelmas Term, 1873, by *Willis* for the appellant, no counsel appearing for the respondent. On the 8th of July, 1874, Lord Coleridge, C.J., said that, as the Court (Keating, Brett, Grove, and Denman, JJ.,) were equally divided, no judgment would be given.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXVII VICTORIA.

STEWART *v.* EDDOWES AND ANOTHER.
HUDSON AND OTHERS *v.* STEWART.

1874
April 21.

Sale of Goods—Statute of Frauds—Alteration of Written Contract by Parol.

A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made certain interlineations in red ink altering the terms, and having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood:—

Held, in an action on a contract in the last-mentioned terms against the purchaser, that, notwithstanding the provisions of the Statute of Frauds, parol evidence was admissible to shew that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to shew what was the condition of the document when it became a contract between the parties.

THE declaration in the first action was for money received by the defendants for the use of the plaintiff.

Plea: Never indebted.

The declaration in the second action was upon an agreement for

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the sale of a ship called the *Amsterdam* by the plaintiffs to the defendant, for the non-payment by the defendant of the balance of the purchase-money of the said ship.

Plea (inter alia), denying the agreement.

Issues.

The trial took place before Amphlett, B., at the Liverpool Spring Assizes, when the facts, so far as at present material, appeared to be as follows:—

Stewart, the plaintiff in the first action and defendant in the second, who was a merchant and shipowner at Liverpool, had entered into negotiations with the plaintiffs in the second action for the sale of the *Amsterdam* by the latter to the former. Messrs. Eddowes, the defendants in the first action were shipbrokers at Liverpool, who had acted as agents for the vendors there. The first action was brought to recover a deposit paid upon the purchase-money of the ship to Messrs. Eddowes by Stewart, and the second to recover the balance of the purchase-money. It appeared that a memorandum containing suggested terms for the sale of the ship, was drawn up by Messrs. Eddowes and sent to Stewart unsigned for approval. Stewart made certain alterations by interlineations in red ink, and signed the document as altered. He then took it back to one of the Messrs. Eddowes, who told him that it would be useless to forward it to the vendors as altered, for it would never be agreed to. The interlineations were then struck out with Stewart's consent, and the document sent to Glasgow to the vendors for their approval. The vendors made some further interlineations, and sent it back to Liverpool. Eddowes then signed it on behalf of the vendors, and took it to Stewart, who acquiesced in the alterations made by the vendors, and approved of the agreement as signed by Eddowes.

On these facts it was objected by the counsel for Stewart, that the parol evidence to shew that Stewart had acquiesced in the alterations made in the contract after he had signed it was inadmissible by reason of the 17th section of the Statute of Frauds. The evidence was admitted, and the verdict was entered against Stewart in both sections.

Benjamin, Q.C. (*Baylis* with him), moved for a new trial, on the ground that the parol evidence was improperly received. There was no sufficient memorandum of the contract sued upon within the Statute of Frauds, various alterations having been made after the defendant Stewart signed. It has been frequently decided that parol evidence cannot be admitted to vary a written contract for the sale of goods within the statute: *Goss* v. *Lord Nugent* (1); *Moore* v. *Campbell* (2); *Noble* v. *Ward.* (3)

[BRETT, J. It is quite true that you cannot alter the contract by parol, because that would be an infringement of the statute; but evidence is admissible to shew what it is that the parties meant their signatures to apply to when the document became an agreement.

LORD COLERIDGE, C.J. All the cases you have cited are no doubt authorities to shew that the contract once made cannot be varied by parol; but here there never was a contract until Stewart assented to the alterations. The evidence given is as to the state of the document when it became a contract.]

All the mischief which the statute was intended to prevent is admitted if the document may be altered to any extent after one party has signed and parol evidence given of his assent to such alteration.

[LORD COLERIDGE, C.J. There may be a fallacy involved in the use of the word "signature." It may mean the mere physical act of writing a name, or the legally binding act of agreement. It is clear in this case, that at the time Stewart actually wrote his name there was no binding agreement.]

The provisions of the 17th section of the statute are not complied with if parol evidence is necessary to couple the signature with the terms actually agreed upon.

LORD COLERIDGE, C.J. I am of opinion that there should be no rule. The facts of the case appear to have been as follows: A memorandum of agreement was drawn up in a certain shape, neither party having signed it. Stewart inserts certain interlineations in red ink and then signs it. He then takes it to the

(1) 5 B. & Ad. 58.

(2) 10 Ex. 323; 23 L. J. (Ex.) 310.

(3) Law Rep. 1 Ex. 117; 2 Ex. 135.

12 Jur NS. 167.

defendant Eddowes, who is the representative of the proposed vendors in the matter. Eddowes tells Stewart that it is useless to send the proposal in that form as the vendors would never agree to it. The interlineations are then struck out, and the document is sent to Glasgow for acceptance by the vendors. There Hudson makes some further interlineations, and acquiesces in the proposal so altered, and with the former interlineations struck out. It is then sent back to Liverpool to Eddowes, who signs it and takes it to Stewart, and informs him that the proposal, with the interlineations made by him struck out and the others put in it, is the agreement that he, Eddowes, is prepared to accept on behalf of the vendors if Stewart will accept it, and Stewart says that he will. It is now suggested that evidence is not admissible to shew that Stewart acquiesced in the striking out of the interlineations in red ink or the insertion of the others, on the ground that that would be to vary the contract by parol. This contention appears to me to be a fallacy. There was no variation of the contract, for there was no contract between the parties until the proposal was submitted to Stewart, and Stewart on meeting Eddowes agreed that his handwriting should operate as a signature to what then became a complete agreement between the parties. There was no evidence to vary the terms after the agreement became an agreement, but only evidence to shew what the agreement was to which the parties agreed when they signed or acknowledged their signatures. When the facts are looked to, it appears that there never was an agreement until the document took the shape in which it now appears.

Brett, J. In this case the vendors relied on a written agreement, and produced a paper at the bottom of which the name of Mr. Stewart was written as a signature. If the document was to be taken as it then appeared, it was conclusive against Stewart; but it was alleged on his behalf, that the paper was not in the condition in which it appeared at the time when it became an agreement; that the interlineations in red ink had not been struck out when he signed it. To that it is replied by Eddowes, that though that was the case, at the time when Stewart signed there was no agreement, but that afterwards it was agreed by Stewart that the paper in its present condition should be the agreement signed by him. It is true that a written agreement cannot be varied by parol. If by that is meant that you cannot shew that the document was different in any respect from that which it appears to be at the trial, Mr. Benjamin's argument must fail. But it is clear that the real point of time to look at with respect to the condition of the document is the time when it became an agreement. Any previous alteration does not come within the rule which forbids the alteration of a written document, for such an alteration is merely the alteration of a proposal for an agreement. Here, when the document was first written, it was a mere proposal; when it was given to Eddowes and sent to Glasgow it was a mere proposal; when it came back to Liverpool it was a counter-proposal only. There was no agreement until Eddowes and Stewart met and agreed that the signatures should be signatures to the agreement. The evidence here was admissible to shew, not what was agreed to, but what was the condition of the paper when the parties agreed that it should be an agreement between them.

DENMAN, J. I am of the same opinion. This was not evidence to alter an agreement already made between the parties, but merely of what the condition of the document was when it became an agreement between them.

Rule refused.

Attorneys for *Stewart: Gregory & Rowcliffe, for Hull, Stone, & Fletcher.*

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April 18.

HAMMOND *v.* THE VESTRY OF ST. PANCRAS.

10 Q.B. 454
C.P.D. 241
245-6

Negligence—Metropolis Local Management Act, 18 *&* 19 *Vict. c.* 120*—Liability of Vestry or Local Board for Injury resulting from insufficient Cleansing of Sewers.*

In the absence of negligence on their part, a vestry or local board is not responsible for any injury resulting to an individual from the disrepair of a sewer.

Sect. 72 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) imposes upon the vestry or local board the duty of properly cleansing the sewers vested in them by the Act. Under the premises of the plaintiff was an old drain which by reason of other houses draining into it had become a "sewer." This drain having become choked, the soil therefrom flowed into the cellar of the plaintiff, a publican, and did damage. In an action against the vestry, founded upon a breach of the duty imposed upon them by s. 72, but not charging negligence, the jury found that the existence of the drain was unknown to the defendants; that its existence might have been known to them by the exercise of reasonable care and inquiry; but that the obstruction of the drain was unknown to the defendants, and could not by the exercise of reasonable care have been known to them:—

Held, that, upon these findings, the defendants were entitled to the verdict; and that the declaration disclosed no cause of action.

Declaration, that, at the time of the committing of the grievances hereinafter mentioned, a certain sewer and barrel drain were vested in the defendants, and the plaintiff was possessed of premises near thereto, and the defendants did not keep the said sewer and barrel drain properly cleansed, whereby they became choked up and overflowed with foul water and other filth, which flowed into and over the premises of the plaintiff, whereby the said premises were much injured, together with certain plant, tools, utensils, cellar pipes, stock in trade, and goods of the plaintiff then being in and near the said premises, and the plaintiff lost the use and enjoyment of the same, and whereby the plaintiff suffered much damage through loss of trade, and whereby the plaintiff was much injured in his health and incurred expense for medicine and medical and surgical attendance: Claim, 300*l.*

Pleas: 1. Not guilty (by statute 25 & 26 Vict. c. 102, Public Act, s. 106); 2. That the said sewer and barrel drain were not vested in the defendants as alleged. Issue thereon.

The cause was tried before Bovill, C.J., at the sittings at Westminster after last Trinity Term. The facts were as follows:—The plaintiff is the keeper of a public-house called The Elephant and

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Castle, in the King's Road, St. Pancras. Under the plaintiff's premises and in the yard attached thereto was a brick drain, which, though originally a private drain, had by reason of two other houses having been drained into it become a "sewer." The existence of this drain or sewer was unknown to the defendants' surveyor, nor had any notice of the alteration been given to him. The drain having by some means (the action of rats or natural decay) got out of repair and become choked up, the soil overflowed into the plaintiff's cellar and did damage.

There was evidence that the stoppage of the brick drain was probably occasioned by rats, and also that the barrel drain in the public road, into which the brick drain should have emptied itself, was free from obstruction.

It was submitted on the part of the plaintiff that the 72nd section of the Metropolis Local Management Act (18 & 19 Vict. c. 120) having imposed upon the vestry the duty of cleansing and keeping cleansed all the sewers vested in them by s. 68, they were liable for all the consequences of a failure on their part to perform that obligation. For the defendants it was insisted that the only duty imposed upon the vestry was, to use all reasonable care and diligence in the performance of the works intrusted to them; and that, if damage resulted to an individual without any negligence on their part, they were not responsible for it.

His Lordship left the following questions to the jury:—

Was the barrel drain a "sewer?" Answer: Yes.

Was the brick drain a "sewer?" Answer: Yes.

Were both, or either, and which, stopped up? Answer. The brick drain was stopped, and not the barrel-drain.

Was the barrel drain known to the vestry? Answer: Yes.

Was the brick drain known to them? Answer: No.

Might it have been ascertained and known by exercise of reasonable care and inquiry? Answer. Yes.

Was the obstruction known before the injury occurred? Answer: No.

Could it have been known by reasonable care that it was obstructed? Answer: No.

A verdict was thereupon entered for the plaintiff for 50*l.* (the damages assessed by the jury), and leave was reserved to the defendants to move to enter a verdict for them if the Court should be of opinion that, upon the evidence given and upon these findings, no liability attached to the defendants.

Sir Henry James, A.G., in Michaelmas Term last, obtained a rule nisi accordingly, and also to arrest the judgment, on the ground that the declaration disclosed no cause of action.

April 16. *Powell, Q.C.*, shewed cause. The question turns upon the construction of some sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By s. 68, all sewers, except the main sewers of the metropolis referred to in sched. D, are vested in the several vestries and district boards, who by s. 69 are bound to repair and maintain them. Sect. 72 enacts that every vestry and district board shall "cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied; and, for the purpose of clearing, cleansing, and emptying the same, they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary." Sections 77 and 78 contain provisions for branching drains into sewers. Sect. 82 impowers the vestry or district board to authorize inspection of drains, privies, and cesspools; and s. 85 to cause them to be put into proper condition where necessary. And by s. 125 the vestry or district board is impowered "to appoint and employ a sufficient number of persons," amongst other things, "for the cleansing out and emptying privies and cesspools, sewers, and drains in or under houses and places within their parish or district." The brick drain in question is a sewer (1)

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(1) Sect. 201, the interpretation clause, provides that "the word *Drain* shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word *Sewer* shall mean and include sewers and drains of every description except drains to which the word 'Drain,' interpreted as aforesaid, applies."

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which by the Act of Parliament is vested in the defendants; and it became their duty to see that it was cleansed and kept in a proper condition. As the jury have found that this duty was neglected, and that the defendants might, if they had exercised reasonable care, have known that the state of things existed which caused the injury to the plaintiff, they are liable in damages. The sewers being under their sole control, they are bound to inquire and to keep them in proper working order. Having failed in the performance of a statutory obligation, and damage having resulted therefrom to the plaintiff, they are clearly liable: *Meek* v. *Whitechapel Board of Works.* (1) It was proposed there to prove that the plaintiff himself contributed to the mischief by throwing refuse into the gutter, which helped to stop up the sewer. But Wilde, B., said: "The evidence is no doubt *admissible* under not guilty; but it would be of no avail unless it connects the wrongful act of the plaintiff with the breach of duty complained of on the part of the defendants: and, looking at the provisions of the Act, it hardly appears that the defence can be sustained. They (the board) have powers to enforce the removal of any refuse, by whomsoever caused, by neglect of scavengers or by act of occupiers. And the very breach of duty charged is, not acting on those powers." And he left this question to the jury,—"Was the overflow caused by neglect of the defendants in not causing the sewers to be kept cleansed, or by a storm so sudden that no reasonable care could provide against it?" And the jury found for the plaintiff.

[BRETT, J., referred to *Wilson* v. *Mayor, &c., of Halifax.* (2)]

There was no *obligation* to fence there, as there is here to cleanse, under s. 72.

[BRETT, J., referred to *Whitehouse* v. *Birmingham Canal Co.* (3)]

There, there was no negligence, and no duty. The defendants inefficiently performed a public work which the Act of Parliament authorized them to perform. Here, however, the defendants have omitted to do something which the Act requires them to do. The claim rests upon a breach of duty.

[BRETT, J., referred to *Brown* v. *Sargent.* (4)]

Sir Henry James, Q.C., and *Beasley,* in support of the rule.

(1) 2 F. & F. 144.
(2) Law Rep. 3 Ex. 114.
(3) 27 L. J. (Ex.) 25.
(4) 1 F. & F. 112.

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HAMMOND *v.* THE VESTRY OF ST. PANCRAS.

There is no case to be found where a public board has been held liable to an action under circumstances like the present. The plaintiff is in effect seeking to cast upon the defendants the duty of cleansing a drain or sewer of the existence of which they had no knowledge, and in reference to which it is not found that they have been guilty of any negligence. The only duty cast upon them by the statute is, to use due and reasonable care to keep the sewers which are under their management and of which they have cognizance in a proper and serviceable condition. Unless the vestry or their officers had the means of knowing the imperfect state of the sewer in question, and were negligently or wilfully ignorant of it,—as was put by Pollock, C.B., and approved of by the House of Lords, in *Mersey Docks* v. *Penhallow* (1),—they are not responsible. The real question is whether the defendants have been guilty of negligence in the performance of a duty imposed upon them by the statute: and this the jury have distinctly negatived. In Com. Dig. *Action upon the Case for Misfeazance* (B.), it is said: "An action upon the case does not lie, where a man has not sufficient notice of his duty." The 82nd section of the statute, which authorizes the inspection of drains, &c., by the vestry or board, pre-supposes that they have knowledge of the existence and position of the thing to be inspected.

Sutton v. *Clarke* (2), *Whitehouse* v. *Fellowes* (3), and *Redhead* v. *Midland Ry. Co.* (4), were also cited.

Cur. adv. vult.

April 18. BRETT, J. This rule was argued on Thursday last before my Brother Denman and myself. It was an action against the vestry of St. Pancras for damage sustained by the plaintiff, a publican residing in their district, in consequence of sewage matter having escaped from a sewer under their management into his cellar: and the action was sought to be maintained upon s. 72 of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. It was contended on behalf of the plaintiff that that section imposed upon the defendants an absolute duty to keep the sewers properly

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12 Jur NS 571

(1) Law Rep. 1 H. L. 93, 96.

(2) 6 Taunt. 29.

(3) 10 C. B. (N.S.) 765; 30 L. J. (C.P.) 306.

(4) Law Rep. 2 Q. B. 412; in error, Law Rep. 4 Q. B. 379.

cleared, cleansed, and emptied, and that, by reason of their neglect of that duty the overflow complained of ensued. On the part of the defendants it was insisted that s. 72 does not impose upon the vestry or district board an absolute duty to keep the sewers cleansed at all events, but only the duty of using all reasonable care and diligence to keep them in a proper and serviceable condition; and that, if a sewer be foul and uncleansed, but without any want of reasonable care and diligence on the part of the vestry, if they have done all that careful and prudent men could do, they are not liable for the consequences. At the trial a verdict passed for the plaintiff for 50*l.*, but leave was reserved to the defendants to move to enter a nonsuit if the Court should be of opinion that, upon the evidence and on the findings of the jury, no liability attached to them. A rule nisi was obtained in pursuance of that leave, and also to arrest the judgment on the ground that the declaration disclosed no cause of action, negligence not being charged. Now, the material findings of the jury were, that a brick drain which passed under or near to the plaintiff's premises was stopped, but that the barrel drain in the street was not stopped; that the barrel drain was known to the vestry, but that the brick drain was not; that the existence of the brick drain might have been ascertained and known by the exercise of reasonable care and inquiry; that the fact that the brick drain was obstructed was not known to the defendants before the injury accrued; and that they could not by the exercise of reasonable care have known that it was obstructed.

It was contended on the part of the defendants that the fact that the brick drain existed was unknown to them absolved them from responsibility. But that seems to me to be answered by the finding of the jury that they might have ascertained its existence by the exercise of reasonable care and inquiry. Ignorance under the circumstances cannot excuse them. I think the case must stand as if the vestry had knowledge of the existence of the brick drain. Upon the facts and the findings we must assume that the brick drain was a "sewer;" and therefore we must take it that the defendants knew of the brick drain, and that the injury to the plaintiff happened through its not having been properly cleansed. Now, if the 72nd section does throw upon the defendants an abso-

9 CPD. 246

lute duty or obligation to guarantee that the sewers shall be at all times kept cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable. The question therefore is, what is the proper construction of the Act of Parliament. That, as it seems to me, will dispose of both points; for, both turn upon the construction of s. 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common-law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute. The words of s. 72 are susceptible of either meaning,—that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by parliament to do a thing which even with the exercise of the utmost care and diligence may not always be capable of being done. It is obvious that circumstances may arise in which a sewer notwithstanding the exercise of reasonable care may be obstructed. The terms of the finding in this case assume that. The jury find in effect that the brick drain was obstructed, but that the obstruction was not known to the defendants and could not by the exercise of reasonable care have been known to them. It would seem to me to be contrary to natural justice to say that parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute: but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of s. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed. I therefore think the rule should be made absolute to enter a verdict for the defendants, and to arrest the judgment.

With reference to one authority to which we were referred, and which seems to be at variance with our present decision, viz. the case before Lord Penzance, *Meek* v. *Whitechapel Board of Works* (1), I have some doubt whether it is not quite consistent with our view, and whether the learned judge was not of opinion in that case that there was evidence of negligence, and did not mean to leave the question of negligence to the jury. If that were so, that ruling would not be inconsistent with our decision in this case: and, if otherwise, notwithstanding the great respect I entertain for one of the cleverest and most able judges I ever saw, I feel bound to say that I differ from him.

DENMAN, J. I am of the same opinion, and clearly so in as far as our decision is consistent with the ruling of Lord Penzance in *Meek* v. *Whitechapel Board of Works.* (1) Possibly if we had before us the whole circumstances of that case, the learned judge did not intend to give the go-by to the question of negligence. This case, however, turns upon the construction of s. 72 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), which it was contended by the plaintiff entitled him to a verdict because it imposed upon the vestry an absolute duty to cause the sewers vested in them to be "properly cleared, cleansed, and emptied" so as not to be a nuisance or injurious to health. At first sight, the language of that section would seem to be positive; and it might very plausibly be contended that an action would lie against the vestry for a breach of the absolute duty thereby imposed upon them. But I do not think that is the true way of reading the clause. The Act of Parliament vests the sewers in the vestry or district board, and empowers them to do a variety of things in connection therewith, some of which contemplate a very considerable outlay. Sect. 72 is only one among many clauses which give them powers to do the things mentioned: but it clearly was not intended to render them liable to an action if in the exercise of those powers they are guilty of no negligence. Two or three things are suggested by the evidence and the findings of

(1) 2 F. & F. 144.

the jury,—such, for instance, as the operation of rats in the drain, —which shew that that is the correct construction of the Act. An obstruction may exist in a drain or a sewer for a considerable time without the vestry or board being able to ascertain the fact until their attention is called to it by the occupier of the premises affected by it. Here, the jury have found that the defendants could not by the exercise of reasonable care have known of the obstruction. That is an ample finding that they were guilty of no negligence, although the jury go on to say that they might have known of the existence of the drain by reasonable care and inquiry. I am of opinion that s. 72 is not so unjust as to impose a liability on the vestry under such circumstances; and I therefore agree with my Brother Brett that the judgment should be arrested and a verdict entered for the defendants.

Rule absolute.

Attorney for plaintiff:
Attorneys for defendants: *Cunliffe & Beaumont.*

April 28.

PHILLIPS *v.* BRIDGE.

Mayor's Court, London—Costs of Rule for Nonsuit in a Superior Court—Practice.

Where a rule is obtained in a superior Court to enter a nonsuit in a cause tried in the Mayor's Court, London, costs of the application cannot be allowed unless asked for by the rule.

THIS case was tried in the Mayor's Court, London, when a verdict was found for the plaintiff, subject to leave to the defendant to move for a nonsuit in a superior Court. A rule nisi was accordingly obtained to enter a nonsuit, and was made absolute in Michaelmas Term last. The rule, however, made no mention of costs: ante, p. 48.

Cock moved to amend the rule by inserting a prayer for costs. He stated that the rule was drawn up in ignorance of the rule, which does not appear in any of the books of practice, but

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which he had since learned from the officer of the Court to be, that, where a rule for a nonsuit or a new trial is obtained in a case in the superior Court, there is no necessity to mention the costs, but that, where the cause is tried in an inferior court, the costs cannot be obtained unless mentioned in the rule. (1)

[DENMAN, J. The application is too late, a whole term having been allowed to go by.]

The plaintiff could not be in any way prejudiced by the delay.

LORD COLERIDGE, C.J. Apart from the delay, which is in itself a fatal objection, we could not grant this application. The practice is inflexible, and every one is bound to know it.

BRETT and DENMAN, JJ., concurred.

Rule refused.

Attorney for defendant: *C. Butterfield.*

D'ARC v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

May 7.

Railway Company—Common Carrier—Special Contract—"At Owner's Risk" —Negligence.

Goods contained in several packages were delivered to a railway company at Chester to be carried to Halifax, under a contract note which expressed that they were to be carried "at owner's risk." Several of the packages were delayed, through the negligence of the company, for, as the jury found, an unreasonable time, and their contents were in consequence damaged:—

Held,—upon the authority of *Robinson* v. *Great Western Ry. Co.* (35 L. J. (C.P.) 123),—that the special terms of the contract did not absolve the company from responsibility for these consequences, notwithstanding that the goods were to be carried at a lower rate than the ordinary rate.

10 Q.B. 215
— 258
1 Q.B.D. 517
1 Ry & Cas 9
10 QBD
254
— 428

DECLARATION. First count, for not carrying and delivering goods entrusted to the defendants by the plaintiff to carry from Chester to Halifax within a reasonable time.

Second count, for damage to the goods by the defendants' negligence.

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(1) The reason is, that, where the record is in the inferior court, there is nothing but the rule upon which costs could be taxed in the superior Court; and, if that be silent as to costs, there can be no taxation at all.

Plea 4. That the goods were delivered by the plaintiff to the defendants subject to a special contract, whereby the plaintiff agreed to bear the risk of all loss or damage or delay in or relating to the carriage, or conveyance, or delivery of the goods by the defendants, in consideration of the defendants' charging him at a reduced rate for the carriage thereof; and that the alleged delay, loss, and damage were part of the delay, loss, and damage the risk whereof was agreed to be borne by the plaintiff.

Issue thereon.

The cause was tried before the assessor of the Court of Passage at Liverpool on the 14th of March last. The facts were as follows:—The plaintiff was the proprietor of a collection of waxwork figures with which he was in the habit of travelling about the country for the purpose of exhibiting them. On the 31st of October, 1873, the plaintiff delivered these goods, which were packed in 111 cases described as containing "theatrical scenery and theatricals," to the defendants at their station at Chester, to be carried to Halifax upon the terms of a special contract (signed by the plaintiff) which stated that they were to be carried "at owner's risk," a lower charge being paid for the carriage of them on that account. The bulk of the goods arrived safely at Halifax on the 2nd of November, which was as early as the business of the company would admit; one waggon, however, containing twenty packages, had by some means become detached from the rest of the train, and was ultimately found at Mirfield Junction, near Malvern, and did not reach its destination until the 7th of November, when it was found that some of the contents had been damaged by exposure to rain.

It was contended on the part of the defendants that they were not responsible for delay, there being no undertaking on their part that the goods should arrive by a particular time, nor any notice to them that their non-arrival by a given day would occasion special damage to the plaintiff; and that by the special terms of the contract they were absolved from the consequences of damage to the goods however caused.

The learned assessor told the jury that the plaintiff was entitled to such damages as he had sustained from the delay, if he had been unable in consequence to use the goods in the way in which he would have used them if they had arrived at Halifax within a reasonable time; and he left two questions to them,—1. Was there negligence on the part of the company? 2. Was the damage done to the goods the consequence of that negligence?

The jury found both questions in the affirmative, and returned a verdict for the plaintiff, damages 40*l.* The learned assessor gave leave to the defendants to move to enter a nonsuit or a verdict for the defendants, if this Court should be of opinion that by the terms of the special contract under which the goods were carried the defendants were not liable for the consequences of their negligence.

Segar obtained a rule nisi in the terms of the reservation, or for a new trial on the ground of misdirection on the part of the learned judge in telling the jury, in assessing the damages, to take into their consideration the damage done to the goods.

R. G. Williams, Q.C., and *Gully,* shewed cause. The latter branch of the rule cannot be sustained, no leave for a new trial having been reserved by the assessor.

[BRETT, J. Is it not competent to this Court to mould the rule, if the justice of the case requires it?]

Clearly not. Besides, here the point was not taken at the trial. The main question is, whether the company are relieved from responsibility for the delay and injury to the goods resulting from their negligence, by reason of the special terms of the contract. *Robinson* v. *Great Western Ry. Co.* (1) is a distinct authority to shew that the stipulation that the goods are to be carried "at owner's risk" does not cover damage by reason of delay. Nor does it absolve the carriers from the consequences of damage to the goods resulting from negligence. In the case of a passenger, it was held in *M‘Cawley* v. *Furness Ry. Co.* (2) that similar words "must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable." But, in the case of passengers the company are not insurers. In *Gill* v. *Manchester Ry. Co.* (3), a cow was carried under a contract by which it was agreed that the company were not to be respon-

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(1) 35 L. J. (C.P.) 123.

(2) Law Rep. 8 Q. B. 57.

(3) Law Rep. 8 Q. B. 186.

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sible for any loss or injury to cattle in the receiving, forwarding, or delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow having been killed by what the majority of the Court conceived to be negligence on the part of a servant of the company, they were held to be liable notwithstanding the special terms of the contract. Lush, J., there says (1): "It cannot, I think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the exception of perils of the sea in a bill of lading relieves a ship-owner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable care and skill, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but, if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him: see *Phillips* v. *Clark*." (2) There are many earlier cases, which are all summed up in the judgment of Parke, B., in *Wyld* v. *Pickford*. (3)

[Lord Coleridge, C.J., referred to *Martin* v. *Great Indian Peninsular Ry. Co.* (4) There, the defendants, carriers in India, received the plaintiff's goods under a contract by which the baggage of certain troops (including the plaintiff's goods) was to remain in charge of a guard provided by the troops, "the company accepting no responsibility:" and it was held that this stipulation did not exempt the defendants from liability for a loss arising wholly from their own negligence.]

That case is directly in point. *Wilton* v. *Atlantic Royal Mail Steam Navigation Co.* (5), *Carr* v. *Lancashire and Yorkshire Ry. Co.* (6), and *Grill* v. *General Iron Screw Collier Co.* (7), were also cited.

Graham, in support of the rule. There is nothing unreasonable in a condition that the goods shall be carried at owner's risk, where, as here, alternative rates are given. All the cases are collected in *Peek* v. *North Staffordshire Ry. Co.* (1); and the fair result of them is summed up in the opinion of Blackburn, J. (2), thus: "I think that a condition exempting the carriers wholly from liability for the neglect and default of their servants is primâ facie unreasonable. I do not go so far as to say that it is necessarily in every case unreasonable and void. A carrier is bound to carry for a reasonable remuneration; and, if he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carrier's risk, or some additional advantage which he is not bound to give and does not give to those that employ him with a common law liability, I think a condition thus offered may be reasonable enough; for, the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option." In *Allday* v. *Great Western Ry. Co.* (3), the condition that "the company are not to be amenable for any consequences arising from detention or delay in or in relation to the conveying or delivering of the said animals, however caused," was held to be unreasonable because no option was given. In *Robinson* v. *Great Western Ry. Co.* (4) the condition was held to be a reasonable one, but not to exonerate the company from the consequences of a negligent delay. That decision was intelligible enough, inasmuch as the contract had reference to the carriage of live animals, which would necessarily require feeding if delayed beyond a reasonable time. *Simons* v. *Great Western Ry. Co.* (5) and *London and North Western Ry. Co.* v. *Dunham* (6) are also distinct authorities in favour of this restriction of the company's liability.

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(1) Law Rep. 8 Q. B. at p. 196.

(2) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168. 3 Jur N.S. 467.

(3) 8 M. & W. 443.

(4) Law Rep. 3 Ex. 9.

(5) 10 C. B. (N.S.) 453; 30 L. J. (C.P.) 369. 8 Jur NS 232

(6) 7 Ex. 707; 21 L. J. (Ex.) 261.

(7) Law Rep. 1 C. P. 600; in error, Law Rep. 3 C. P. 476. 12 Jur NS 727

[BRETT, J. Do you say that the result of the cases is that a condition which might be unreasonable if there was but one

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(1) 10 H. L. C. 473; 32 L. J. (Q.B.) 241. 9 Jur NS 914

(2) 10 H. L. C. at p. 511. 9 Jur NS 920

(3) 5 B. & S. 903; 34 L. J. (Q.B.) 5. 11 Jur NS 12

(4) 35 L. J. (C.P.) 123.

(5) 18 C. B. 805; 26 L. J. (C.P.) 25.

(6) 18 C. B. 826; 26 L. J. (C.P.) 25.

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rate of charge, becomes reasonable if there are alternative rates?]

It is enough for the present purpose that a Court of co-ordinate jurisdiction has said so. Mere delay is not negligence.

[Brett, J. The jury have found that there was negligent delay. If that is not covered by this contract note, you cannot enter a nonsuit.]

Lord Coleridge, C.J. I am of opinion that this rule should be discharged; and I base my opinion upon the case of *Robinson* v. *Great Western Ry. Co.* (1) within which this case distinctly falls. The goods in question, consisting of wax-work figures, were sent by the defendants' railway from Chester to be carried to Halifax, under a special contract which described them as being carried "at owner's risk." The greater part of the goods arrived safely; the remainder, consisting of twenty cases, did not reach their destination until several days afterwards, having been delayed on the journey and damaged in consequence of the negligence of the servants of the company, of which there was abundant evidence for the jury. This Court in *Robinson* v. *Great Western Ry. Co.* (1) determined, upon a contract in terms very similar to those of the contract in the present case, that the words "at owner's risk" only exempted the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence of the company. That case is directly in point, the only difference being that there the thing carried was live stock, and here goods. The other cases referred to do not come in question.

Brett, J. This case is clearly not distinguishable from *Robinson* v. *Great Western Ry. Co.* (1) If there had been any distinction between that case and this, Mr. Graham would have suggested it. The circumstance of the one case relating to live and the other to inanimate chattels was hardly put as a real distinction.

Denman, J. If this had been the case of a loss or damage to goods in the course of the transit, possibly *Simons* v. *Great Western Ry. Co.* (2) might have been held to apply. But it is unnecessary

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(1) 35 L. J. (C.P.) 123.

(2) 18 C. B. 805; 26 L. J. (C.P.) 25.

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to consider that. *Robinson* v. *Great Western Ry. Co.* (1) is so distinctly in point that we cannot do otherwise than discharge this rule.

Rule discharged.

Attorney for plaintiff: *H. Sowton.*

Attorney for defendants: *R. F. Roberts, for R. M. Preston, Chester and Liverpool.*

GUNN *v.* ROBERTS AND OTHERS.

May 5.

12QLD/6

Ship and Shipping—Ship's Necessaries—Authority of Captain to pledge Owner's Credit—Effect of Owner's having an Agent at the Port.

Where the owner of a ship had an agent at the port where she was lying, authorized and ready to supply the ship's requirements:—

Held, that the master had no implied authority to pledge the owner's credit at such port for necessaries supplied for the ship's use.

DECLARATION, common counts for money lent and work done, and materials provided, and money found to be due on accounts stated.

Plea (inter alia), never indebted, and as to part of the claim, payment into court.

Issues.

The facts at the trial appeared to be as follows:—The defendants were the owners of a ship called the *Aracana*. The action was brought to recover in respect of goods and materials supplied and money advanced by the plaintiff upon the order of the captain of the *Aracana* for the necessary purposes of the ship while she was at Quebec, to which port she had come in search of a cargo. The ship was consigned to Messrs. Ross & Co., at Quebec, and the defendants supplied them with funds and authorized and instructed them, as their agents, to advance any further sums for the purpose of supplying the necessities of the ship for her voyage. The defendants had forbidden the captain from applying or pledging their credit to any other persons than Ross & Co. in respect of the ship's necessaries. The plaintiff was ignorant of this, and of the fact that Ross & Co. were the defendants' agents; but the jury found that he might, by making ordinary inquiry, have ascertained the fact that Ross & Co. were the defendants' agents for the purposes of the ship. Ross & Co. were ready, and willing, and able to advance any sums that might have been necessary for the purposes of the ship. Upon these facts the verdict was entered for the plaintiff for 113*l.*, leave being reserved to the defendants to move to enter it for themselves, on the ground that, on the facts proved and found by the jury and admitted, the defendants were not liable in point of law for any part of the plaintiff's claim, or beyond the sum paid into court.

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(1) 35 L. J. (C.P.) 123.

A rule nisi had been obtained accordingly.

Benjamin, Q.C., and *Wormald*, shewed cause. The master is the general agent of the owner for the purposes of the ship, and his authority cannot be limited by restrictions unknown to the person dealing with him: Smith's Mercantile Law, 7th ed. p. 128; *Grant* v. *Norway*. (1) The advances made in the present case are admitted to be necessaries.

[BRETT, J. It is clear if the things supplied are necessaries there is a general authority to order them, but the question is in what sense is the term "necessaries" used. Suppose the owner himself were in the port, would the captain have authority? In such case goods supplied to the captain's order would not be necessaries in one sense, because the owner would have supplied them. Is not an agent at the port the same as the owner?]

If the owner were at a foreign port unknown to the person making the advance, the captain would have authority to pledge the owner's credit.

[BRETT, J. The opinion of Lord Abinger in *Arthur* v. *Barton* (2) is against you. He says, "But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required.]

That was merely a dictum, not being necessary for the decision of the particular case, and it applies to the case of a general agent, known to be such to all the world, as for instance, the agents of the Cunard steamships at their regular ports, not to the case of an agent for a particular occasion only. This was not like the case of a ship at her regular port; the ship here was at a strange port on a seeking voyage.

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(1) 10 C. B. 665; 20 L. J. (C.P.) 93.

(2) 6 M & W. 138.

[BRETT, J. Suppose the captain has funds in hand supplied by the owners, can he pledge the owner's credit? Yet the person making the advance may not know that he has such funds.]

Here no funds were in fact advanced, though it was found that Ross & Co. were ready to advance. It is a question of fact for the jury whether the goods supplied were necessaries or not. The question cannot depend on the existence of an agent only, for the person making the advance might inquire and be unable to find out whether there was an agent or not. In such case it would appear from the opinion expressed by Dr. Lushington in *The Faithful* (1), that there would be an implied authority in the captain to pledge the owner's credit. This case is wholly distinguishable from such a case as that of *Johns* v. *Symons* (2), where the ship was in a home port, and the owner could easily be communicated with. The statement of the law by Lord Abinger in *Arthur* v. *Barton* (3), cannot now be considered as correct, and the only question is whether the things are necessary for the ship: *The Alexander.* (4)

[BRETT, J. According to your contention the shipowner is left quite defenceless.]

It must be shewn that the advance has been expended for necessaries not supplied from some other source. The owner must, therefore, always have the benefit of the advance. It is only a question whether credit is to be given by A. or B. Can secret instructions to the captain to procure necessaries from B. only discharge the owner, if the captain disobeys and procures advances from A., from all liability to A., and enable him to take advantage of sums in fact advanced by the latter for necessaries without repaying them?

They cited *Brayshaw* v. *Eaton* (5); *Edwards* v. *Havell* (6);

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(1) 31 L. J. (P. M. & A.) 81.

(2) 2 Q. B. 425.

(3) 6 M. & W. 138.

(4) 1 Wm. Rob. 346.

(5) 5 Bing. (N.C.) 231.

(6) 14 C. B. 107; 23 L. J. (C.P.) 8.

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Mackintosh v. *Mitcheson* (1); *Williamson* v. *Page* (2); *Webster* v. *Seekamp* (3); *The Riga* (4); *Macready* v. *Thorn.* (5)

C. Russell Q.C., and *Cohen Q.C.*, supported the rule. The onus of proving that the advances were of necessaries lies on the plaintiff. That is not satisfied merely by shewing that the articles were necessary for the ship, i.e. things that somebody must supply, but regard must be had to the question whether the captain was otherwise supplied with the means of obtaining them. When the owner has provided the captain with funds or other means of providing such necessaries there is no implied authority to pledge his credit. The question is whether, in defining "necessaries," the nature of the thing supplied alone is to be looked at. If so, then it would be immaterial whether the owner were at the port or could be communicated with, which would clearly conflict with the whole current of authority. The question is not as to the necessity of the thing supplied for the ship, but the necessity for entering into the particular contract for the supply of it.

[They were then stopped by the Court.]

BRETT, J. The facts of the case are as follows: The plaintiff supplied to the defendants' captain in a foreign port goods which may be taken to have been necessaries in the sense that the ship would not have been fit to sail unless somebody had supplied them. But it was proved or admitted that the owners had instructed Ross & Co. to act as their agents for the ship in the port, and had supplied them with funds for that purpose, and authorized them to advance any further sums that might be necessary on their credit. It was also admitted that Ross & Co. being so instructed to act as agents for the management of the ship in the port, as such agents, were ready, and willing, and able to advance any sums which might be required for the ship. The captain who, in fact, knew of this, though I do not say his knowledge was material, fraudulently gave orders to the plaintiff for supplies to be advanced on the credit of the owners. The plaintiff was altogether innocent of the fraud, and was also ignorant of the authority given to Ross & Co., and of the fact of their being agents for the ship. The jury found that the plaintiff might by reasonable inquiry have known that Ross & Co. were such agents, and were authorized to advance money for the purposes of the ship. Under these circumstances the plaintiff having afforded supplies for the ship, brought this action against the defendants for money advanced and goods supplied for the use of the ship, on an alleged contract to repay such money and pay for such supplies. One point that was taken was, that though the captain was not entitled to borrow money and pledge the owners' credit, yet he having done so, the defendants had ratified his acts. There is no doubt they could so ratify them, but to prove such ratification it was necessary to shew that they acted with knowledge of the circumstances. There was no evidence of this, and therefore it seems to us there was no ratification. The case therefore is the ordinary case of money lent, and goods supplied, on the order of the captain. Now, there was no actual contract between the plaintiff and defendants, the contract being in point of fact made between the captain and the plaintiff, and the defendants are not bound unless the captain had authority. It was said that the captain is the general agent of the owners. That proposition cannot be supported in the fullest sense of the terms in which it was stated. The captain has authority to bind the owners to pay for supplies or repay money advanced, only when the necessity of the case gives him that authority. In order to give rise to that authority it has for many years been recognised that two things are necessary; first, it must appear that the money borrowed or goods supplied were necessary for the use of the ship, not absolutely necessary, but reasonably necessary according to the ordinary course of prudent conduct in the opinion of the jury; secondly, it is not sufficient that the moneys lent, or goods supplied, were necessary for the ship's use, but it must be shewn also that it was reasonably necessary that the captain should obtain or order them on the owner's credit. If the captain be in a foreign port, and the owner is not there, and there is no agent of his there, and the captain has not himself been put in funds by the owner, then it may be reasonably necessary that he should order supplies on the owner's credit for the necessary purposes of the ship, as in the case of *Edwards* v. *Havell* (1); but if he is either in a port in the owner's country or a foreign port, and the owner is there with means to pay for goods or credit to order them for himself, the owner is the master of affairs, and there is no necessity for the captain to order them or to pledge the owner's credit, and so there is no necessity for the captain's making a contract to bind the owner. Accordingly, if it be found that the owner is present at the port, and has the means or credit to obtain supplies, I think it is the law of England that the judge should direct the jury that there is no necessity for any authority on the part of the captain, and the jury would not be justified in finding that there was any such necessity. The same principle applies even when the owner is not present, if he has either in a port in his own or a foreign country constituted an agent to stand in his place, and intrusted such agent with his discretion to act in the management of the ship, and such agent has undertaken and has the necessary means or credit to do so. In such case the agent represents the owner, and the captain as servant of the owner is bound to act under his directions, and has no authority to act for himself in the matter. This view of the law appears to be supported by all the authorities. The leading case on the subject is *Arthur* v. *Barton* (2), and the opinion there expressed by Lord Abinger as a summary of all the previous authorities has always been held as a correct expression of the law. That opinion has always been quoted with approbation ever since; it has never to my knowledge been questioned and has been copied into all the text books, as for example, Abbott on Shipping, 11th ed. p. 114; Smith's Mercantile Law, 7th ed. p. 128, and McLachlan on Merchant Shipping, p. 131.

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(1) 4 Ex. 175; 18 L. J. (Ex.) 385.

(2) 1 C. & K. 581.

(3) 4 B. & A. 352.

(4) Law Rep. 3 A. & E. 516.

(5) 51 New York App. Ca. 454.

Mr. Benjamin contended that the general law is that the master has an implied authority to bind the owner in respect of all things that are necessary for the navigation of the ship; but the question upon which the extent of this proposition depends is the meaning of the term "necessary." That was discussed in *Arthur* v. *Barton* (2), and the limitation of the meaning of the term there laid down is that the necessity of the thing depends not only on the question whether it is necessary for the use of the ship, but

(1) 14 C. B. 107; 23 L. J. (C.P.) 8.

(2) 6 M. & W. 138.

on the question whether the owner is himself present at the port or has an authorized agent there. Mr. McLachlan, in his work on Merchant Shipping, p. 131, correctly states the law as follows: "As appears from those early cases, but especially the last, there are well-defined limits to the exercise of this authority on the part of the master. First, in cases where the owner or his agent is at the port of the ship's anchorage, or so near to it as to be reasonably expected to interfere personally, the master cannot, without special authority for the purpose, pledge the owner's credit for the ship's necessities." And further: "This authority of the master, when it exists, extends only to such things as a prudent man would deem reasonably necessary and proper to be done or supplied for the purpose of the voyage on which the vessel is engaged."

Two elements therefore are essential to the captain's authority: first, that the goods supplied should be such as it must be taken the owner, if present, would, as a prudent man, have thought necessary; and, secondly, that neither the owner nor a recognised agent of the owner, able to pay for the supplies or to obtain them on credit, should have been present at the port. If the plaintiff fails in proving the existence of either of these elements, he fails in proving the necessary authority to bind the defendants. This doctrine is in accordance with the law with regard to hypothecation. No captain is entitled to hypothecate the ship unless the necessity of the case gives him authority. And it is essential to such authority that neither the owner nor any authorized agent of his should be at hand; and it is necessary in this case, on account of the onerous nature of the obligation, that the money should have been procurable by no other means than the hypothecation of the ship. Unless these conditions exist, however necessary the advance may have been for the purposes of the ship, there is no authority on the part of the captain. In these cases attempts have been made to contend that if the person advancing money did not know that the owner or his agent was at hand, he was entitled to charge the owner, on the order of the captain as a general agent; but it has invariably been held that the absence of knowledge on the part of the person making the advance was immaterial.

The same law applies to the captain's right to sell part of the

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cargo. It has been said that the decision in *The Faithful* (1) has broken in upon the previous line of authority on this subject. I have the utmost respect for the opinion of Dr. Lushington, than whom a more accurate lawyer never sat on the bench; but I feel bound to say that some of the views thrown out by him in that case seem to me to be novel, and I doubt whether they can be sustained. But even if they could, they would not assist the plaintiff in this case, for the finding of the jury takes the case out of the limitation suggested in *The Faithful.* (1) I do not think that the American case that was cited in any way derogates from the view expressed in *Arthur* v. *Barton* (2) and the previous English authorities.

For these reasons I think that, on proof that Ross & Co. were the agents of the owners for the management of the ship at the port, and had undertaken and were ready and able to act as such, the judge ought to have directed the jury that there was no case for the plaintiff, and that this rule should, therefore, be made absolute.

DENMAN, J. I am of the same opinion. The case of *Arthur* v. *Barton* (2), which has been relied on for the defendants, does not, it is true, contain an actual ruling on the point now in question, but only a dictum. That dictum, however, is entitled to the greatest weight. It was delivered in a case in the argument of which the whole of the law on this subject had been brought before the Court, and it has been adopted and approved of in subsequent cases and the text books. In Maude and Pollock's Merchant Shipping, 3rd ed. p. 112, the law is thus stated: "This implied authority does not usually exist in cases where the owner can himself personally interfere, as, for instance, when the ship is in a port where the owner resides, or at which he has beforehand appointed an agent."

In all the statements of the law of the subject it seems always to be assumed that it is well settled that the captain has no authority to pledge the owner's credit when he has an authorized agent in the port. Though there is no case actually deciding the point, all the cases seem to corroborate this view. In all the

(1) 31 L. J. (P. M. & A.) 81.

(2) 6 M. & W. 138.

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decisions with respect to a ship in her home port, the question whether the master was justified in pledging the owner's credit seems to have been made to turn on the question whether there was any person at hand who might more properly be considered as having authority to pledge such credit; and it seems to have been generally recognised that if there were an agent of the owner present at the port he would be the proper person to bind the owner. With regard to the question of ratification I agree with my Brother Brett. In the view we have taken, the finding that the plaintiff might have ascertained that Ross & Co. were defendants' agents becomes immaterial, but it may be remarked that even if the view alleged to have been taken in the case of *The Faithful* (1) be correct, the finding of the jury prevents its having any application to the present case, and so quacumque viâ the plaintiff must fail.

Rule absolute.

Attorneys for plaintiff: *Stevens, Wilkinson, & Harris.*

Attorneys for defendants: *Field & Roscoe, for Bateson.*

BOWS, APPELLANT; FENWICK, RESPONDENT.

May 4.

9 QB 440.
10 QB 105.
2 Ex D 273.
8 QBD 277
278, 280.

Unlawfully using a "Place" for the Purpose of Betting, within 16 & 17 *Vict.* c. 119, s. 3.

The appellant was on a race-course standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when open was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." The defendant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him, and for which he gave a ticket:—

Held, that the appellant was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, and was properly convicted thereof under 16 & 17 Vict. c. 119, s. 3.

CASE stated by justices pursuant to 20 & 21 Vict. c. 43.

At a petty session of the peace holden in and for the city of

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(1) 31 L. J. (P. M. & A.) 81.

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Chester on the 14th of June, 1873, George Bows was charged with having on the 9th of May, 1873, in the said city and borough, being then the occupier of a certain place, to wit, a standing on the Roodee there situate, unlawfully used the said standing for the purpose of betting with persons resorting thereto, upon certain events and contingencies of and relating to a certain horse-race, contrary to s. 1 of the statute 16 & 17 Vict. c. 119.

It appeared from the evidence that, on the day in question, during the Chester races, the defendant was on the Roodee or racecourse, standing on a stool about 2 ft. 6 in. high, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when opened was 7ft. or 8 ft. high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters, "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." The defendant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him at the time, and for which he gave a ticket.

It was contended on behalf of the defendant that the stool and umbrella did not constitute a "place" within the meaning of the Act of Parliament, 16 & 17 Vict. c. 119, s. 1; but, the justices being of opinion that they did, they convicted the defendant in a penalty of 5*l.*

The question for the opinion of the Court was, whether the stool and umbrella used as aforesaid by the defendant did constitute a "place" within the terms of the Act of Parliament and section above referred to.

Straight, for the appellant. The conviction was wrong. The 16 & 17 Vict. c. 119, intituled "An Act for the suppression of betting-houses," recites that "a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf,

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on their promises to pay money on events of horse-races and the like contingencies," and enacts (by s. 1) that "no house, office, room, or other place shall be opened, kept, or used," for the purposes mentioned in the preamble; and s. 3 enacts that "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or any of them," shall, on summary conviction before two justices, be liable to a penalty not exceeding 100*l.* The question is whether the stool and umbrella described in the case constituted an "office, room, or other place," within s. 3 of the statute. In *Doggett* v. *Catterns* (1), the Exchequer Chamber, reversing the judgment of this Court (2), held that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, was not the using of a "place" for such purpose, within the meaning of the Act; Bramwell, B., saying: "The object of the statute was to put down ascertained places of resort for gambling. I think the place in question was not a place of that sort within the contemplation of the Act."

[Lord Coleridge, C.J. *Shaw* v. *Morley* (3) is more like this case. On land adjoining a race-course, and just outside an inclosure reserved for ticket-holders, was a long strip of ground of 6 ft. wide, bounded on one side by an iron railing which surrounded the inclosure, on the other side by a permanent wooden paling facing the open ground. Within this strip were placed temporary wooden structures, in which during the races the business of betting was carried on. There were desks fronting both ways, and at each desk was a clerk with a book, and a person standing in front of each desk conducted the business on behalf of the person who rented the strip of land, and the bets were recorded by the clerk. At one of these structures the appellant conducted this

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(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159. 11 Jur NS 243

(2) 17 C. B. (N.S.) 669; 34 L. J. (C.P.) 46. 10 Jur NS 1236

(3) Law Rep. 3 Ex. 137.

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business. On appeal from a conviction under 16 & 17 Vict. c. 119, s. 3, the Court of Exchequer held that this structure was an "office" and a "place" within the meaning of the statute, and that the appellant was rightly convicted. Kelly, C.B., in giving judgment, says: "This structure was clearly a place and an office opened, kept, and used for the purpose of carrying on the business of which the appellant had the care and management, or which he assisted in conducting. If on the grounds urged by the appellant we were to determine to the contrary, at once betting-offices copied from the words in which this structure is described would throughout England set the Act at defiance. It is no matter whether there is a roof or none, or whether the structure is removeable or fastened to the earth; it is clearly an office within the meaning of the Act. Then, was the business conducted by the appellant the business prohibited by the Act? The preamble shews that it is within the intent of the Act; for, the mischief recited is exactly gaming of the description which was here conducted by the appellant, carried on by means of an office. And, further, the business described in the first section, and the conducting of which in an office kept for that purpose is made penal by s. 3, is exactly the business described in the case as conducted by the appellant; from the beginning to the end, what has been done is the very thing to prevent which the Act was passed." And Martin, B., adds: "The structure described was both an office and a place. It is equally clear that the appellant has done in this place what the Act declares to be illegal." I am unable to distinguish the stool and umbrella in this case from the stool and desk there.]

The words "other place," in the statute, mean a place ejusdem generis with those specifically described. In *Shaw* v. *Morley* (1), there was a desk, the usual furniture of an "office," and the party no doubt paid rent for the use of the spot.

[Lord Coleridge, C.J. "Other place" must mean something different from an "office" or "room." It cannot be denied that this case is directly within the mischief pointed at by the Act.]

In *Doggett* v. *Catterns*, Bramwell, B., says (2): "The object of the statute was to put down ascertained places of resort for gambling. I think the place in question was not a place of that sort within the contemplation of the Act."

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(1) Law Rep. 3 Ex. 137.

(2) 19 C. B. (N.S.) at p. 767.

[Brett, J. Would a space of ground inclosed with stakes and ropes, like a prize-ring, be a "place" within the Act? Or a waggon with an awning?]

Nothing can be said to be a fixed or ascertained place from which the occupant might be ordered to move on.

No counsel appeared for the respondent.

Lord Coleridge, C.J. I am of opinion that this conviction should be affirmed. It proceeds in terms upon s. 1 of 16 & 17 Vict. c. 119, which enacts "that no house, office, room, *or other place* shall be opened, kept, or used" for the purposes mentioned in the preamble, viz. the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies. Then comes s. 2, which enacts in the same words that "every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house within the meaning of 8 & 9 Vict. c. 109." And then comes s. 3, upon which in truth this conviction must be sustained, which enacts that "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or any of them," shall, on summary conviction before two justices, be liable to a penalty not exceeding 100*l.*

The facts found by the magistrates are these:—During the Chester races the appellant was on the race-course, standing on a stool about two feet six inches high, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when opened was seven or eight feet

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high. It was a showery day; but the umbrella was kept up, rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words "We pay all bets first past the post." The appellant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him at the time, and for which he gave a ticket. It is plain that the appellant was (provided the stool and umbrella constituted an office, room, or place within the meaning of the Act,) publicly using them for a purpose prohibited by the Act. The only question raised before us was, whether or not they did constitute an office, room, or other place. Now, the thing described clearly was not a house or a room. Was it an office or other place? Possibly it might be said to be in some sense an office: but I am of opinion that at all events it was a "place." It was an ascertained spot where the appellant for the time at least carried on the business of betting with all persons who might resort thither for that purpose. The card connected with the umbrella and the inscription upon it clearly indicated a fixed and ascertained place used by the appellant for a purpose prohibited by the Act.

This statute is, no doubt, an interference with the liberties of the subject, and is therefore to be construed strictly. Two cases upon it have been referred to, the one, *Doggett* v. *Catterns* (1), a decision of this Court, reversed by the Exchequer Chamber (2), the other a decision of the Court of Exchequer, *Shaw* v. *Morley*. (3) In *Doggett* v. *Catterns* (1) this Court held that the habitual use of a spot in a public park where the party walked about receiving deposits, to return a larger sum on the contingency of a particular horse winning a race, was the using of a "place" for such purpose within the meaning of the Act. The Exchequer Chamber reversed that decision, though upon conflicting,—I will not say inconsistent,—grounds; the Lord Chief Baron thinking that the circumstance of the place being open to the sky or the structure not being fixed to the earth did not prevent its being an office or a place within the meaning of the Act; and Bramwell, B., being of

(1) 17 C. B. (N.S.) 669; 34 L. J. (C.P.) 46. 10 Jur NS 1238

(2) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159. 11 Jur NS 263

(3) Law Rep. 3 Ex. 137.

opinion that the object of the legislature was to put down betting of the kind described in an ascertained place to which people might resort for the purpose of doing that which the Act intended to prohibit. One half of the Court agreed with the Lord Chief Baron, and the other half with Mr. Baron Bramwell. It is enough, however, to say that this case is not governed by that case. There was there no ascertained place within the ambit of the park in which the appellant carried on his avocation. Without, therefore, quarrelling with the decision of the Exchequer Chamber, which does not at all interfere with our present judgment, we find in *Shaw* v. *Morley* (1) a case exactly all fours with the present. I have already stated the facts of that case, and the observations of Lord Chief Baron Kelly and Martin, B., thereon. The circumstances are not exactly the same as here; but they are much more like them than those of *Doggett* v. *Catterns* (2), and the reasoning of the judges carries me to the conclusion I have arrived at. There is a sufficient fixity of the structure by means of the spiked umbrella to bring the case within the words of the Act, as it is clearly within the mischief, and our judgment is not opposed to any case that I have been able to find. The conviction must be affirmed.

Brett, J. When the Act of Parliament in question passed, the legislature had not made up its mind to prohibit gaming altogether. But what it did mean to prohibit was that which is described in the preamble, viz. a kind of gaming which had of late sprung up, tending to the injury and demoralisation of improvident persons, "by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies." That discloses the kind of gaming which was sought to be suppressed. The enacting part of s. 1 then provides that "no house, *office*, room, or *other place* shall be opened, kept, or used" for the purposes mentioned in the preamble. And then s. 3 enacts that "any person who, being the

1 C.Q.B.10

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(1) Law Rep. 3 Ex. 137.

(2) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159. 11 Jur. N.S. 243.

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owner or occupier of any house, *office*, room, or *other place*, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, *office*, room, or *place* opened, kept, or used for the purposes aforesaid, or any of them," shall on summary conviction be liable to a penalty. It would seem, therefore, that the kind of gaming prohibited is the opening and keeping a place for the purpose of gaming or betting with persons resorting thereto,—a fixed place to which all persons may resort. I agree that it is necessary that it should be a "fixed place," whether on a race-course or elsewhere. The remarks both of Pollock, C.B., and of Bramwell, B., in *Doggett* v. *Catterns* (1) shew that, to bring it within the statute, the place used need not be a house, office, or room, but that it must be a fixed and ascertained place. Now, was this a fixed place? It was a place selected and fixed upon by the appellant for persons who desired to deal with him to resort to. I therefore think it was a place within the contemplation of the Act. The appellant goes there with a stool and a thing which probably is not an umbrella, but is more like an open tent. He takes it, not to shelter him from the rain, but to be a fixed place. The material part of the statement is, that, having fixed this umbrella or tent into the ground, with his name painted on it and a reference to a club at Leeds which probably has no existence, he exhibits a card with these words, "We pay all bets first past the post,"—meaning obviously, we pay here; or, in other words, if the holders of tickets will resort to or come under this umbrella they will be paid, if winners. The umbrella was intended as a fixed place for persons desirous of making bets to resort to, and was clearly a place within the contemplation of the Act as interpreted by this Court and by the Exchequer Chamber in *Doggett* v. *Catterns.* (1) Mr. Straight suggests that this was not a fixed place, because the appellant paid no rent, and was liable to be moved on by the police. I must confess I see no weight in that suggestion.

Denman, J. I am of the same opinion. I agree with my

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159. 11 Jur NS 243

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Lord that neither of the cases referred to is absolutely in point. And I think that *Shaw* v. *Morley* (1) approaches more nearly in its circumstances to this case than *Doggett* v. *Catterns* (2) does. The question is whether the place used by the appellant for the exercise of his calling was an "office" or "other place" within the meaning of s. 3 of the statute. I think it was. It was enough that there was a piece of ground ascertained and appropriated by the appellant for carrying on his proceedings. He stood upon a stool, covered by a large umbrella, not for the purpose of sheltering him from the weather, but with the inscription upon it and the card to indicate the spot to which persons desirous of having betting transactions with him might resort, and the kind of business he was carrying on there; and the case finds that he was seen to make bets and to issue tickets. I am clearly of opinion that he was properly convicted.

Conviction affirmed.

Attorneys for appellant: *Doyle & Edwards, for J. P. Cartwright, Chester.*

May 8.

In the Matter of ISABELLA HOWARD.

In the Matter of JULIA ASHCROFT.

Husband and Wife—Acknowledgment of Deed under 3 & 4 *Wm.* 4, c. 74—*Affidavit of Verification—Absence of Signature of Deponent—Blanks.*

The affidavit verifying the certificate of an acknowledgment taken by special commissioners in the East Indies left a blank for the place of abode of one of the commissioners; but, as the affidavit stated that he was "the other commissioner in the said certificate mentioned," the Court allowed it to pass.

The affidavit was not *signed* by the deponent. The jurat, however, stated that it was sworn before a magistrate and justice of the peace (who duly described his office or authority) by the deponent:—

Held,—upon the authority of *Re Eady* (6 Dowl. 615) and Reg. Gen. Hilary Term, 1863,—that the defect was cured.

On the 7th of April, 1873, a commission was issued from this Court under the 3 & 4 Wm. 4, c. 74, directing William Chaine, major in the 4th Hussars, George Marriner, captain in the 58th regiment of Foot, *George J. D. Hay, major in Her Majesty's army,* and the Rev. *M. S. Laing*, chaplain in Her Majesty's army, all residing at or near to Rawull Pindee, in the East Indies, or any two of them, to take the acknowledgment of Isabella, wife of Frederick Howard, of Rawull Pindee aforesaid, sergeant in the 4th Hussars.

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(1) Law Rep. 3 Ex. 137.

(2) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159. 11 Jur N.S. 243.

The certificate of the taking of the acknowledgment, dated the 12th of December, 1873, stated that Isabella Howard appeared before *Malcolm S. Laing* and *G. J. Dalrymple Hay*, two of the commissioners in the said commission named, and produced an indenture bearing date the 21st of January, 1873, and made between Robert Sheffield and Ann Margaret his wife of the first part, Frederick Howard and Isabella his wife of the second part, William Ashcroft and Julia his wife of the third part, William Street of the fourth part, and Thomas Thorpe De Lasaux and Robert Augustus De Lasaux of the fifth part, and duly acknowledged the same.

This document was signed "Malcolm S. Laing, chaplain of Rawull Pindee," and "G. Dalrymple Hay, Lieut.-Col. B.S.C."

The affidavit verifying the certificate was made by "Malcolm S. Laing, chaplain of Rawull Pindee, one of the commissioners mentioned in the certificate hereunto annexed:" but it was not signed by the deponent. The jurat, however, was as follows:—"Sworn before me by the above Malcolm S. Laing, chaplain of Rawull Pindee, Punjab, East Indies, this 12th day of December, 1873. J. W. S. M'Call, Court magistrate and J.P."

In this affidavit the deponent stated that "the acknowledgment therein mentioned was made by the said Isabella, and the certificate signed by me and Lieutenant Colonel G. J. Dalrymple Hay, of ———, in the ——— of ———, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at Rawull Pindee, in the Punjab of East Indies, in my presence."

The officer having declined to receive and file the documents without the order of the Court or a judge, on the ground of the absence of complete identification of "Lieut.-Col. G. Dalrymple Hay" with the "Major George J. D. Hay" mentioned in the commission, and also on the ground of the blanks in the affidavit of verification and the want of the signature of the deponent thereto, application was made to Archibald, J., at Chambers. That learned judge, without expressing any opinion, referred the matter to the Court.

There was a second commission of the same date, directing "William A. P. Wyllie, the major commanding the 9th brigade of Her Majesty's Royal Artillery, stationed at Secunderabad, East Indies, Pemberton Harrison, a lieutenant in the same brigade, and J. J. Fullarton Cumming, also a lieutenant in the same brigade, or any two of them," to take the acknowledgment of Julia, wife of William Ashcroft, quarter-master of the said 9th brigade, now stationed at Secunderabad," of the same deed. The certificate was signed by William A. P. Wyllie and Pemberton Harrison, two of the commissioners named; and the affidavit of verification, which was made by Pemberton Harrison, contained the same blanks as in the former case, and was also without the deponent's signature. The jurat, which was in the same form, was signed "R. L. Jones, magistrate and justice of peace for Secunderabad."

The officer for the same reasons declined to receive and file these documents:

Macrae-Moir moved that the officer be directed to receive and file the acknowledgments and affidavits, notwithstanding these irregularities. The omission of Col. Hay's place of abode in the affidavit of verification by his co-commissioner is cured by the statement in that affidavit that the acknowledgment therein mentioned was made by the party and the certificate signed by the deponent and by Col. Hay, "the other commissioner in the said certificate mentioned." Although the place of abode of Col. Hay is not filled in, he is sufficiently identified by his rank in the army (he having taken a step since the commission was sent out) and the number of his regiment. The omission of a deponent's addition in an affidavit was, in *Seymour* v. *Maddox* (1) held to be a mere irregularity.

[BRETT, J. Mr. Laing's affidavit seems to cure that defect.]

The next objection is that the deponent Laing has not *signed* the affidavit of verification. That, however, it is submitted, is cured by the rule of Court of Hilary Term, 1863, which provides that "with respect to acknowledgments of deeds by married women, taken in any colony or foreign possession being part of the dominions of Her Majesty, it is ordered that affidavits verifying

(1) 1 L. M. & P. 543.

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the same made before any Court, or judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such Court or judge, magistrate, commissioner, notary public, or other person, of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of 3 & 4 Wm. 4, c. 74, s. 85, relating to affidavits of verification." It is enough, therefore, that the affidavit is signed by the magistrate before whom the deponent is sworn. In the case of *Re Eady* (1), the affidavit was signed by the judge before whom it was sworn, and not by the deponent, it being contrary to the practice of the Courts in Germany that any signature should be attached to an affidavit except that of the judge before whom the oath is administered: and the Court allowed the acknowledgment to be filed.

[Lord Coleridge, C.J. There was evidence before the Court there that the course which had been adopted was that which is regularly taken in Germany.]

It is enough if the Court is fairly satisfied that the authority delegated to the special commissioners has been duly exercised, and that the requirement of the Acts of Parliament and of the rules of Court have been substantially observed.

Lord Coleridge, C.J. I think these documents may be filed. The 3 & 4 Wm. 4 gives power to the Chief Justice of this Court, by s. 73, to appoint special commissioners for the purpose of taking the acknowledgments of deeds by married women in the colonies. We have before us a commission duly issued appointing William Chaine, major in the 4th Hussars, George Marriner, captain in the 58th regiment of Foot, George J. D. Hay, major in her Majesty's army, and the Rev. M. S. Laing, chaplain in Her Majesty's army, all residing at or near to Rawull Pindee, in the East Indies, or any two of them, to take the acknowledgment of Isabella, wife of Frederick Howard, of Rawull Pindee, sergeant in the 4th Hussars. The deed is before us, dated the 21st of January, 1873: and there is a certificate, dated the 12th of December, 1873, signed by Malcolm S. Laing, and G. J. Dalrymple Hay, "two of the com-

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(2) 6 Dowl. 615.

missioners in the said commission named," stating that Isabella Howard appeared before them and produced an indenture bearing date the 21st of January, 1873 (describing it), and duly acknowledged the same. Then there is a document, which purports to be an affidavit of verification made by "Malcolm S. Laing, chaplain of Rawull Pindee, one of the commissioners mentioned in the certificate hereunto annexed," who makes oath that "the acknowledgment therein mentioned was made by the said Isabella, and the certificate signed by me and Lieutenant-Colonel G. J. Dalrymple Hay, of ———, in the ——— of ———, *the other commissioner in the said certificate mentioned*, on the day and year therein mentioned, at Rawull Pindee, in the East Indies, in my presence." This affidavit is not signed by the deponent; but the jurat is as follows:—"Sworn before me by the above Malcolm S. Laing, chaplain of Rawull Pindee, Punjab, East Indies, this 12th day of December, 1873, J. W. S. M'Call, court magistrate and J. P." There is, therefore, evidence before us that this acknowledgment was taken in the presence of two of the commissioners named in the special commission, and with all proper formalities, provided that this was a sufficient affidavit. Now, s. 85 of 3 & 4 Wm. 4, c. 74, enacts that "every such certificate as aforesaid [prescribed by s. 84] of the taking of an acknowledgment by a married woman of any such deed as aforesaid [see s. 77], together with an affidavit by some person verifying the same and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter [s. 89] mentioned; and such officer shall examine the certificate, and see that it is duly signed either by some judge or master in Chancery, or by two commissioners appointed pursuant to this Act [s. 73], and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and, if all the requisites of this Act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas." The question is whether that enactment has

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been complied with. The affidavit of verification is not signed by the deponent. That is, upon the face of it, an irregularity. But the jurat shews that it was duly sworn by the commissioner (Laing) before a person properly qualified. And the rule of Court of Hilary Term, 1863, to which we have been referred, provides that affidavits verifying certificates of acknowledgments of deeds by married women, taken in any colony or foreign possession being part of the dominions of Her Majesty, "made before any Court or judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such Court or judge, magistrate, commissioner, notary public, or other person, of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of 3 & 4 Wm. 4, c. 74, s. 85, relating to affidavits of verification." We have here a statement by a person competent to make it, that this affidavit, though not signed by the deponent, was duly sworn before a magistrate having authority to take affidavits; and that, I think, is evidence upon which we can properly say in this case that the provisions of the Act of Parliament have been complied with. In the case of *Re Eady* (1), the affidavit was signed by the judge and not by the deponent, it being contrary to the practice of the Courts in Hamburg that any signature should be attached to an affidavit except that of the judge before whom the oath is administered. The Court, however, required that fact to be verified by affidavit; Tindal, C.J., observing that, "to the eye of a person merely looking at the affidavits, the evidence would otherwise appear incomplete." Here, we are asked to go a step further; but it is to be observed that that case occurred before the Rule of Court of Hilary Term, 1863. I am of opinion that, having regard to that case and to the rule, there is enough here to cure the defect. The documents may, therefore, be received and filed.

The circumstances of the two cases being identical, the rule may go in both of them.

Brett, J. The law requires that the acknowledgment of a deed by a married woman "in any colony or foreign possession, being part of Her Majesty's dominions," shall be taken before special commissioners appointed by the Lord Chief Justice of the Court of Common Pleas, who are to certify under their hands that she has duly acknowledged the deed; and that there shall be an affidavit,—which affidavit may be made, where it is found convenient, by one of the commissioners—verifying the certificate of acknowledgment. Here, we have a certificate assuming to be signed by two of the commissioners, and an affidavit purporting to be made by one of them, "that the acknowledgment therein mentioned was made by the married woman, and the certificate signed by him and by Lt.-Col. G. J. Dalrymple Hay, of ———, the other commissioner in the certificate mentioned," on the day and year therein mentioned, in his presence. This affidavit was objected to upon two grounds,—first, that it did not sufficiently identify one of the commissioners, inasmuch as his place of residence was not mentioned: but I think that defect is cured by the statement that he is "the other commissioner in the certificate mentioned." The second objection is that this was no affidavit at all, or no sufficient affidavit, because it does not bear the signature of the deponent. Now, in this country, the signature of the deponent to every affidavit is required, and an affidavit without signature is irregular. The question, therefore, is, whether that irregularity is sufficiently got over here. The rule of Hilary Term, 1863, provides that, where the acknowledgment is taken in a British colony, the affidavit verifying the same, made before any Court or judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such Court, judge, magistrate, &c., of the name or title of office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of 3 & 4 Wm. 4, c. 74, s. 85, relating to affidavits of verification." Here, the jurat is signed by a magistrate, with a description of the office or authority which he holds; and he states that the affidavit was sworn before him by the deponent at the time and place mentioned. I think that is enough to satisfy us that the affidavit was duly sworn by one of the commissioners, pursuant to the require-

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(1) 6 Dowl. 615.

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ment of the rule of Hilary Term, 4 Wm. 4, and cures the irregularity. The Court, no doubt, has always looked strictly to these proceedings, relating as they do to the conveyance of property by persons who especially require protection. But, there must be some limit to that strictness; and, where commissions are sent out to remote places to be executed by persons who are generally not very conversant with business of this sort, it is obvious that some relaxation of the stringency of our rules may reasonably be allowed, where enough appears to satisfy the Court that the Act of Parliament has been substantially complied with. I agree with my Lord that we are going a step further than the Court went in the case of *Re Eady* (1); but, under the circumstances, I think we are justified in granting this application.

Denman, J. I agree with my Lord and my Brother Brett in thinking that this application may be granted; though at the same time I must say that the officer was quite right in declining to receive and file these documents without the sanction of the Court. The only question of any difficulty is, whether an affidavit which is not signed by the deponent is an affidavit at all. *Re Eady* (1) shews that, under certain circumstances, signature may be dispensed with. That case, coupled with the rule of Hilary Term, 1863, I think, warrants us in granting this application. It is to be observed that there is nothing in the form given in the rules of Hilary Term, 4 Wm. 4, to indicate that a signature is necessary; and this may have misled the parties.

Rule granted.

Attorneys for applicants: *Doyle & Edwards.*

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(1) 6 Dowl. 615.

PETROCOCHINO AND OTHERS *v.* BOTT.

1874
April 30.

Shipping—Construction of Bill of Lading—Usage of the Port of London as to the Discharge of Goods from Steamers in the Docks.

Goods were shipped under a bill of lading in these terms:—"Shipped in good order and condition by Petrocochino Brothers, of Calcutta, in the steamer *Zeno*, bound for London, sixty-nine bales hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid port of London," &c., "on payment of freight," &c.

On her arrival in London the *Zeno* went into the Victoria Docks, and notice was given to the consignees that she was ready to unload. The custom of the Victoria Docks as to the unloading of steamers was proved to be as follows:—The goods are taken from the deck of the vessel by the company's servants and placed on the dock quay, or, if perishable, under sheds, and, if the consignee or his agent does not appear to claim them within twenty-four hours, they are warehoused by the company. If the consignee or his agent sends a lighter, they are put into the lighter from the quay by the servants of the company. The expenses of landing the goods and putting them into lighters are paid by the shipowner, but, if the goods are warehoused, this is done at the expense of the owner of the goods.

Within the proper time the consignees of the sixty-nine bales sent a lighter for them. The whole sixty-nine were proved to have been landed by the company's servants and placed on the quay; but the evidence failed to satisfy the jury that more than sixty-eight were put into the lighter. The other bale was never traced:—

Held, that the shipowner was not responsible for the missing bale.

THE first count of the declaration stated that the plaintiffs shipped on board a ship of the defendant, called the *Zeno*, hides, to be carried from Calcutta to London, and there delivered, on the terms of a bill of lading, as follows:—

"Shipped in good order and condition by Petrocochino Brothers, of Calcutta, in the steamer *Zeno* . . . . bound for London, sixty-nine bales hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, where the ship's responsibility shall cease, at the aforesaid port of London, or so near thereto as she may safely get (the act of God, &c., being excepted), unto Messrs. Petrocochino Brothers, or his or their assigns, on payment of freight.

"Weight, contents, and value unknown. The goods to be discharged from the ship as soon as she is ready to unload into hulk, lazaretto, or hired lighters, if necessary, and to be landed by the master and agent at the risk and expense of the owners of the goods.

Breach, that, although the defendant delivered to the plaintiffs

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part of the said goods, in accordance with the terms of the bill of lading, he did not deliver the remainder.

There was also a count for the conversion of one bale of hides.

Pleas, 1. To the first count, that the goods were not shipped on board the defendant's ship, as alleged; 2. To the first count, a denial of the alleged breach; 3. To the first count, that the goods were delivered from the ship's deck, within the true intent and meaning of the bill of lading; 4. To the second count, not guilty; 5. To the second count, not possessed. Issue thereon.

The cause was tried before Brett, J., at the sittings in London after Hilary Term, 1873. The plaintiffs are merchants carrying on business in London, and the defendant is a shipbroker also carrying on business in London, and was the charterer of the *Zeno*. It was admitted that sixty-nine bales of hides were shipped by the plaintiffs at Calcutta on board the *Zeno*, in March, 1872, as stated in the bill of lading. These sixty-nine bales were marked and numbered as follows:—

The whole of them were marked ⟨PB⟩; 30 of them were also marked P S, and numbered 249 to 278; 25 were marked $\overset{\text{C S}}{\text{S}}$, and numbered 279 to 303; and the remaining 14 were marked M S, and numbered 4 to 17.

It was proved to be the course of business for steamers arriving in the Victoria Docks to give immediate notice thereof to the owners or consignees of the goods on board; and the goods are then landed by the servants of the dock company and placed on the quay, or, if they are perishable, under sheds; and if the consignee or his agent does not appear to claim the goods within twenty-four hours, they are warehoused by the dock company. If the consignee or any person appointed to receive the goods sends a lighter, they are put into the lighter from the quay by the servants of the dock company; the expenses of landing the goods and putting them into lighters are paid by the shipowner; but, if the goods are warehoused by the dock company, this is done at the expense of the owner of the goods. It is the duty of a Custom-house officer to go on board and see that nothing remains after the ship is unloaded; and this was proved to have been done.

On the arrival of the *Zeno* on the 4th of May, 1872, notice was given in the usual way to the plaintiffs as consignees of the sixty-nine bales in question, and also to the consignees of 383 other bales brought by the same ship; and lighters were in due course sent by Messrs. Culverwell & Co. to receive the whole of the hides, of which twenty-five bales were to be put on board the steamship *Gould*, and the remainder to be conveyed to Sun Wharf, a wharf in the Thames belonging to Culverwell & Co., to be warehoused.

Thompson, the warehousekeeper at Victoria Docks, whose duty it was to superintend the landing and delivery of the goods, stated that he delivered into the lighters sent by Culverwell & Co. all the bales of hides which he could find with the marks and numbers given to him, all of which went to Sun Wharf, and amongst which were twenty-five bales marked P. B. put on board the barge *Ladore* on the 6th of May, seventeen on board the *Jason* on the 8th of May, six on board the *Kent* on the 14th of May, and one on board the *Nestor* on the 30th of May,—all similarly marked. He proved that 452 bales in all left the Victoria Dock in the lighters sent by Culverwell & Co.

The superintendent of the Sun Wharf proved that 427 bales only were received by him at the wharf, and that twenty-five were put on board the *Gould*. Of the sixty-nine bales marked P. B. and consigned to the plaintiffs, sixty-eight only were found on board the lighters; one bale, numbered 266, was never traced. None of the lightermen were called.

On the part of the defendant it was submitted that, the shipowner having landed the hides on the dock quay for his own convenience and at his own expense, and the agents of the consignees being there within a reasonable time ready to receive them, the delivery on the quay was not a delivery to the consignees.

The learned judge ruled that, according to the terms of the bill of lading, and the usage of the port of London, as soon as the goods left the ship's deck the shipowner's responsibility was at an end,—the delivery was then complete according to the terms of the contract. The goods then remained in the custody and care of the dock company until they could in the usual course of business be put into lighters or be warehoused. He then left the following questions to the jury: 1. Were these sixty-nine bales marked P. B.

delivered from the ship to the dock company on the quay? 2. Were the sixty-nine bales marked P. B. delivered by the dock company's servants into the lighters sent by Culverwell & Co.?

The jury having answered the first of these questions in the affirmative and the second in the negative, the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for 41*l.*, the agreed value of the missing bale, and also reserving leave to the defendant to move on the ground that the finding of the jury on the second question was against the weight of evidence.

Thesiger, Q.C., in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiffs for 41*l.*, on the ground that the second finding of the jury amounted in law to a verdict for the plaintiffs; or for a new trial, on the ground that the first finding was against the weight of evidence,—the defendant on the argument of the rule being at liberty to contend that the second finding of the jury was against the weight of evidence.

Jan. 24. *Cole, Q.C.*, and *R. E. Webster*, shewed cause. By the express terms of the bill of lading the shipowner's responsibility was at an end the moment the hides left the ship's deck. According to the course of business at the Victoria Docks, steamers are at once unloaded by the servants of the company, not into lighters, but on to the quay; the dock company being for this purpose the agents of both parties. The fact that the landing charges are paid by the ship-owner is immaterial. When the goods are placed on the quay, the shipowner has lost all dominion over them; his lien and his responsibility are both gone. There was abundant evidence to shew that all the bales which were on board the *Zeno* were unloaded and placed on the quay. It has never been disputed that a delivery according to the custom of the port of London discharges the shipowner. In *Gatliffe* v. *Bourne* (1), Tindal, C.J., says: "We know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery"—

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(1) 4 Bing. N. C. 314, 329.

following out the dictum of Buller, J., in *Hyde* v. *Trent and Mersey Navigation Co.* (1)

Thesiger, Q.C., and *Graham*, in support of the rule. By the bill of lading the goods were to be delivered in London "unto Messrs. Petrocochino Brothers, or their assigns." The dock company are not "assigns," neither are they in any sense the agents of the consignees. For the services performed by them in respect of the goods, they are paid by the ship-owner. He gets no discharge from the dock company on landing the goods on the quay; whereas, if he had delivered into lighters, as contemplated by the bill of lading, he would have had the lighterman's receipt. The receipts given by the lightermen to the dock company in this case express the delivery to have been "overside."

[BRETT, J. Suppose application to be made for goods by the consignee within twenty-four hours after notice, and from some cause the dock company are unable to deliver them, is the ship-owner still answerable for them?]

No doubt he is. If the goods had been delivered into lighters, —which was the mode of unloading here contemplated,—the ship-owner's liability would have continued until the delivery was complete: *Catley* v. *Wintringham.* (2) The finding upon the second question left to the jury was against the weight of evidence.

April 30. The judgment of the majority of the Court (Brett and Denman, JJ.), was delivered by

BRETT, J. This case was argued in Hilary Term last, before my Brothers Denman and Honyman and myself. It stood over in consequence of a doubt entertained by my Brother Honyman. As, unfortunately, we do not expect to have the benefit of his assistance for some time, my Brother Denman and myself feel bound to pronounce our decision on the case without any further delay.

The action was brought to recover damages for a breach of contract, in not delivering goods according to a bill of lading. The bill of lading was for sixty-nine bales of hides to be carried from Calcutta to London, "to be delivered from the ship's deck, where the ship's responsibility shall cease." On the arrival of the ship in London, she was taken into the Victoria Docks, and notice was given to the consignees of the hides that she was ready to discharge her cargo. The hides were immediately unloaded and placed on the quay. This was done by the servants of the dock company and in the absence of the consignees or their agents. Certain of the goods were then forwarded in barges sent by the consignees to Sun Wharf, a wharf in the river Thames. It was proved on the trial before me that the sixty-nine bales in question were delivered from the ship to the dock company; but there was evidence which satisfied the jury that one of the bales was not delivered by the company on board the lighters. It is obvious, therefore, that after the goods had left the ship's deck one bale was by some means lost. Its value was 41*l.*

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(1) 5 T. R. 389, 397: "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

(2) Peake [150], 202.

On the part of the consignees it was argued that the defendant, the ship-owner, was liable for the loss, on the ground that he had failed to deliver that one bale to the consignees or their agents; that the delivery of the goods to the dock company was a thing done for the convenience and at the expense of the ship-owner; and that, if any of the goods were lost through the negligence of the dock company, the ship-owner was responsible for it. On the other side it was contended that, according to the true interpretation of the bill of lading, the ship-owner was not responsible in any way for the goods after they had left the ship's deck: and the jury have expressly found that the proper number of bales had left the deck.

Now, the terms of the bill of lading (which is not in the ordinary form) are these,—"Shipped in good order and condition by Petrocochino Brothers, of Calcutta, in the steamer *Zeno*, bound for London, sixty-nine bales hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid port of London," &c.

The general principle seems to be that, where goods are consigned to a particular port, delivery is to be made according to the usage which prevails at that port. For instance, where

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goods are to be delivered "at the port of Cardiff," the ship-owner's contract is fulfilled if he delivers them at the particular part of the port where goods of that class are required to be delivered. So, if delivery is by the usage of the port to be made in a certain manner, a delivery in that manner satisfies the ship-owner's undertaking to deliver at the port, unless there be something in the terms of the contract inconsistent with it.

At the trial of this case, witnesses for the plaintiffs gave evidence of the usage of the Victoria Docks. That usage was thus stated:—When a steamer arrives in the dock, notice is given to the consignees of the goods on board; and the goods are landed from the ship on to the quay by the servants of the company, the ship-owner not interfering. If the consignees apply for the goods within twenty-four hours, they get them from the quay free of charge,—not from the ship into the lighters, but from the quay; the goods being put into the lighters by the servants of the company. For this service the ship-owner pays. If the consignees do not apply for the goods within twenty-four hours, they are warehoused by the dock company, and the consignees pay the charge for warehousing. Thus, the mode and manner of delivery of goods according to the usage of the port of London is, not an immediate delivery from the ship to the consignee, but from the ship to the quay, and from the quay to the consignee. Having regard to that usage this bill of lading is drawn. It seems to me that it could not more accurately describe the mode of delivery from the ship's deck to an intermediate place of delivery. That being so, according to the true construction of this bill of lading, I am of opinion that the moment the ship-owner has cleared the goods from the deck, he ceases to be responsible in any way for them; and that, whatever remedy the plaintiffs may have against the dock company, or any one else, they cannot under the circumstances charge the ship-owner with the loss of the bale in question.

The rule to enter the verdict for the plaintiffs will therefore be discharged.

DENMAN, J. I will only add that I never entertained a doubt, but that my Brother Honyman was not altogether clear which way the decision ought to be. I should have been very glad if we

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could have obtained his ultimate views of the matter, though the result of the rule would have been still the same.

Rule discharged.

Attorneys for plaintiffs: *Markby & Tarry.*
Attorneys for defendant: *Lowless, Nelson, & Jones.*

April 30.

CLIFFORD v. HOARE.

Construction of Covenant—Easement—Right of Way—Party or Privy.

25 Ch D 783

The plaintiff purchased two of several plots of building land of which the defendant was mortgagee in fee. The conveyance, to which the defendant and the mortgagor were both parties, contained a grant of a right of way in these terms,—"Together with full and free right and liberty for the grantee, his heirs, &c., at all times and for all purposes, &c., with or without horses, carriages, &c., to pass and re-pass over and along the roads or intended roads and ways delineated in the plan," and also a covenant *by the defendant* that he had not "done, omitted, or knowingly suffered or *been party or privy to* anything whereby the premises conveyed, or any part thereof, were or might be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he was in any wise hindered from granting and releasing the same premises, or any part thereof, in manner aforesaid."

Another plot had previously been sold to A. In the conveyance to A. (to which the defendant as mortgagee was a party), *the mortgagor* covenanted with A. that he would at his own expense "pave and complete and make fit for use, and at all times maintain in good repair, a private road, the site of which private road is marked 'Private Road A B' on the plan drawn in the margin of these presents (describing it), and will make such road of a width of not less than forty feet throughout its entire length." This was the road over which a right of way was granted to the plaintiff in his conveyance. In this deed was also a proviso that it should be lawful for A. "to erect and maintain a porte-cochère or projection extending over the foot-pavement of the said private road marked A B, provided that the plan thereof be submitted to the mortgagor, and approved of by him." This portico when finished projected about two feet into the carriage-way of the private road A B, but there was ample space left for the convenient enjoyment by the plaintiff of the way granted to him:—

Held, that, there being no substantial interference with the right of way or easement granted to the plaintiff, he was not entitled to maintain an action against the defendant upon his covenant; but that, if there had been such interference with any right of the plaintiff, however small the damage, the defendant was sufficiently a "party or privy" to the conveyance to A. as to have rendered him liable.

THIS was an action brought to recover damages for the breach of a covenant in an indenture dated the 2nd of August, 1872, and made between the plaintiff and defendant as hereinafter appears, whereby a right of way was granted to the plaintiff in the manner therein set forth.

The cause came on to be tried before Bovill, C.J., at the sittings in Middlesex after Hilary Term, 1873, when a verdict was by consent entered for the plaintiff for the damages in the declaration, subject to the opinion of the Court upon the following case:—

1. The plaintiff was formerly a colonel in the guards, but is now yeoman usher of the black rod in the House of Lords; the defendant is a banker in London.

2. Mr. Mitchell Henry, at the dates of the execution of the two indentures hereinafter mentioned, was possessed of an estate called the Kent House Estate, at Kensington, and had borrowed money on the security thereof from the defendant, who thereupon became mortgagee in fee.

3. In the spring of 1872, Lady Ashburton negotiated with Mr. Mitchell Henry for the purchase by her of a portion of the Kent House Estate, which portion consisted of the plot of land coloured pink on a plan annexed to the case; and by indenture of the 17th of May, 1872, the plot was duly conveyed to Lady Ashburton, and the defendant became a party to the indenture, as mortgagee. By that indenture Lady Ashburton was impowered to erect a porte-cochère or projection on the west side of her proposed house, in these terms:—"And further, that it shall be lawful for Lady Ashburton, her heirs or assigns, to erect and maintain a bow or projection on the first, and (if desired by her or them) also on the upper floors of the messuage or dwelling-house thereinafter covenanted to be erected by her (but only on the western side of the said piece or parcel of ground first thereinbefore described), provided that no such bow or projection shall be made over the private road marked A B on the plan, at a greater distance from the Kensington Road than 100 feet: And also that it shall be lawful for Lady Ashburton, her heirs and assigns, to erect and maintain a porte-cochère (1) or projection extending from the west side of the last-mentioned messuage or dwelling-house over the foot-pavement of the said private road marked A B: provided that the plan of any projection or projections be submitted to the

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(1) Meaning a "portico." So called in subsequent paragraphs.

said Mitchell Henry, his heirs or assigns, and approved of by him or them."

4. Previously to the 17th of May, 1872, the plaintiff and his wife, who had learnt that the property was to be sold in building plots, were in treaty for the purchase of the plots coloured blue on the plan (1); and on the 24th of May they entered into a contract with Mr. Mitchell Henry for the purchase thereof, and it was afterwards conveyed to them by indenture of the 2nd of August, 1872, to which the defendant as mortgagee was a party.

5. By the indenture of the 2nd of August, 1872, there was, amongst other things, granted to the plaintiff a right of way as follows,—"Together also with full and free right and liberty for Clifford, his heirs and assigns, and his and their friends, servants, and workmen, and the respective tenants and occupiers for the time being of the said pieces or parcels of land and any buildings to be erected thereon respectively, and all and every other persons and person, for the benefit and advantage of Clifford, his heirs or assigns, from time to time and at all times hereafter at his and their will and pleasure, and by night and by day, and for all purposes, either with or without horses, carts, and carriages, to pass and repass over and along the roads or intended roads and ways which or the intended directions whereof are respectively delineated on the said plan and are thereon coloured brown and green respectively."

And by the same indenture the defendant covenanted as follows:—"And the said P. R. Hoare doth hereby, for himself, his heirs, executors, and administrators, covenant with Clifford, his heirs and assigns, that the said P. R. Hoare hath not done, omitted, or knowingly suffered, or been party or privy to anything whereby the premises hereinbefore expressed to be hereby by him granted and released, or any part thereof, are, is, or may be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he is in anywise hindered from granting and releasing the same premises, or any part thereof, in manner aforesaid."

6. Between the 24th of May and the 2nd of August, the plaintiff had inspected the plans of Lady Ashburton's house, and was

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(1) One being next adjoining the land of Lady Ashburton, the other at the end of the private road A B.

aware of her intention to build the portico if she had a right to do so; but he believed she had no such right, and completed his purchase on the faith of that belief. [The evidence to support this paragraph was taken subject to the objection of the defendant thereto.]

7. Pursuant to the proviso in the third paragraph above set forth, Lady Ashburton commenced to build a portico, which had been erected as high as the frieze at the commencement of August, 1872. The portico was inclosed by a hoarding ten feet high, but was visible to any person going upon the works for that purpose. The plaintiff was not aware until September, 1872, that the portico had been commenced. The plan of such portico had been approved by Mr. Mitchell Henry. (1)

10. The Court was to have power to draw all inferences of fact.

11. It was contended on behalf of the plaintiff, but denied by the defendant, that, under the above circumstances, there had been a breach by the defendant of the covenant set forth in par. 5.

The question for the opinion of the Court was whether, upon the facts stated, the defendant was liable in this action, the damages, if any, to be referred to a surveyor.

Philbrick, Q.C., for the plaintiff. The substantial question is, whether or not the defendant has been guilty of a breach of his covenant in the deed of the 2nd of August, 1872, that he had done nothing to impeach or affect the way granted to the plaintiff by that deed. The case falls within the principle laid down in 2 Sugden's Vendors and Purchasers, 10th ed. 514,—"A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken:" *Nash* v. *Ashton*. (2) The same is laid down in Platt on Leases, 310; and at p. 328 it is said: "The erection of a gate across a lane through which the plaintiff had a way to his close, was holden to be a breach of a covenant by the defendant for quiet enjoyment, and that he would not do anything to molest, hinder, or prevent the plaintiff in the quiet possession or enjoyment of the lands; and it was said to be immaterial, as to the defendant, whether the gate was erected by right or by wrong; for, in either case, being an obstruction, it should not have been erected there:" citing *Andrews* v. *Paradise* (1), and *Morris* v. *Edgington.* (2)

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(1) There was a model of the works while in progress, and also a plan of them as finished (which were to be referred to on the argument), describing the position and dimensions of the portico, shewing that the structure increached two feet beyond the kerbstone into the 40-foot road A B, leaving a clear space of 24 feet 8 inches of carriage way.

(2) Sir T. Jones, 195; Skin. 42.

[LORD COLERIDGE, C.J. You must contend that we are to construe this covenant as if it were an obstruction to a highway brought before us on an indictment.]

Be it so. The grant is of a clear way of a given width for the exercise of the right. If the erection objected to had been put up after the conveyance to the plaintiff, he would have had a remedy by injunction. The plaintiff is entitled to have a way of the width shewn in the plan, without any obstruction or incroachment. It is not because the incroachment is slight that the plaintiff is to be deprived of his action. It may be that reasonableness of user may be a question for a jury: *Hawkins* v. *Carbines* (3); *Harding* v. *Wilson* (4); but this is a question of right.

Sir John Karslake, Q.C., for the defendant. The main question is whether, under the covenant for a right of way over the road in the plan, the plaintiff is entitled to anything more than a reasonable use of it, or whether he has a grant of the whole road and every square foot of it. *Harding* v. *Wilson* (4) is extremely like the present case. There, a lease of premises described them as abutting on "an intended road of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an underlease was granted, describing the premises as abutting on "an intended way," not mentioning the width: and it was held that the underlessee was entitled to a *convenient* way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. And see *Squire* v. *Campbell* (5), and *Child* v.

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(1) 8 Mod. 318.

(2) 3 Taunt. 24.

(3) 27 L. J. (Ex.) 44.

(4) 2 B. & C. 96.

(5) 1 My. & Cr. 459

Douglas. (1) Then, the defendant was no party to the covenant under which Lady Ashburton was permitted to erect this portico. It is true he was a formal party to the deed which contained that covenant, but he could not therefore be said to have "knowingly suffered or been party or privy to" that covenant.

Philbrick, Q.C., in reply. It is impossible to say that the defendant was not party or privy to the deed of the 17th of May, 1872, under which Lady Ashburton was enabled to erect the portico complained of: *Hobson* v. *Middleton.* (2) The main question is whether the plaintiff has had the thing he bargained for; if not, he is clearly entitled to maintain this action.

Lord Coleridge, C.J. I am of opinion that our judgment in this case ought to be for the defendant. The action is brought upon a covenant contained in a deed of the 2nd of August, 1872. It was a conveyance of two parcels of land of which the legal estate was in the defendant, and the beneficial or equitable interest in Mr. Mitchell Henry (both of whom were parties to the deed), to Colonel Clifford, the plaintiff. The deed contained a recital that "it was further agreed that such conveyance should be made of the said pieces or parcels of land, with the appurtenances and rights of way as thereinafter appearing." After describing the parcels, the conveyance goes on, "Together also with full and free right and liberty for Colonel Clifford, his heirs and assigns, and for his and their friends, servants, workmen, &c., from time to time and at all times hereafter at his and their will and pleasure, &c., with or without horses, carts, and carriages, to pass and repass over and along the roads or intended roads and ways which or the intended directions whereof are respectively delineated on the plan," &c. That is a conveyance of the premises with a right of way,—an easement. No question arises, or could arise, as against Mr. Mitchell Henry, the equitable owner. But the defendant, who is a party to the deed as legal owner, enters into a covenant to this effect, "that he the said P. R. Hoare hath not done, omitted, or knowingly suffered, or been party or privy to anything whereby the said premises hereinbefore expressed to be hereby by him granted and released, or any part thereof, are is, or may be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he is in anywise hindered from granting and releasing the same premises, or any part thereof, in manner aforesaid." Thus, the defendant, on the 2nd of August, 1872, covenants that he has not done, omitted, or knowingly suffered or been party or privy to anything whereby the grant of the easement to Colonel Clifford has been "impeached or affected." It is said that the defendant has been guilty of a breach of that covenant, because he had on the 17th of May, 1872, been party or privy to a deed under which Lady Ashburton had been allowed to obstruct and diminish the enjoyment of the right of way or easement so granted to the plaintiff. In order to see whether or not that amounts to a breach of the defendant's covenant with Colonel Clifford, it will be necessary to see what are the covenants contained in the prior conveyance to Lady Ashburton, to which Mr. Mitchell Henry and the defendant also are both parties. After several recitals which it is not material to notice, the operative part of the deed is the grant to Lady Ashburton of another portion of the same estate, together with a right of way upon which no question turns. There is then a covenant similar to that in the conveyance of the 2nd of August, 1872, "that the said P. R. Hoare has not executed or done, or knowingly suffered or been party or privy to, any deed or thing whereby or by reason or means whereof the premises hereinbefore granted or expressed so to be, or any of them, or any part thereof, are, is, or may be impeached, charged, or incumbered in title, estate, or otherwise howsoever." And then comes this important covenant,—"And further, that he the said Mitchell Henry, his heirs or assigns, will before the 17th of January, 1873, at his or their own expense, construct, pave, and complete and make fit for use, and at all times (until the burthen thereof shall have been adopted by some competent public authority) maintain in good repair, a private road on the western side of the said piece or parcel of ground first hereinbefore described, the site of which private road is marked 'Private Road A B' on the said map or plan drawn in the margin of these presents, and which said road runs from the high road leading from Kensington to London, along the western boundary of the said piece or parcel of ground first hereinbefore described, to the ground in the rear of

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(1) Kay, 560.

(2) 6 B. & C. 295.

Montpelier Square, *and will make such road of a width of not less than forty feet* (1) *throughout its entire length.*" Then there follows this proviso, that "it shall be lawful for Lady Ashburton, her heirs or assigns, to erect and maintain a bow or projection on the first and (if desired by her or them) also on the upper floors of the messuage or dwelling-house hereinafter covenanted to be erected by her (but only on the western side of the said piece or parcel of ground first hereinbefore described), provided that no such bow or projection shall be made over the private road marked A B on the said map or plan at a greater distance from the Kensington Road than 100 feet; and also that it shall be lawful for the said Lady Ashburton, her heirs and assigns, to erect and maintain a porte-cochère or projection extending from the west side of the said last-mentioned messuage or dwelling-house over the foot-pavement of the said private road marked A B, provided that the plan of any projection or projections be submitted to the said Mitchell Henry, his heirs or assigns, and approved of by him or them." Mr. Mitchell Henry, therefore, in a deed to which the defendant is a party, covenants to make the road marked A B of the minimum width of forty feet, and he also covenants that Lady Ashburton shall be permitted to erect a portico over the foot-path, provided the designs are submitted to and approved of by him. The erection complained of as a breach of the defendant's covenant with the plaintiff is this portico. It is said to be an infringement of the right of way granted to the plaintiff by the deed of the 2nd of August; and it is further said that, as the defendant was a party to both deeds, he has broken his covenant with the plaintiff, because in May, 1872, he was party to a deed whereby the easement granted to the plaintiff by the deed of August was affected.

Two points were raised on the argument,—first, whether there has been an interference with the right granted to the plaintiff by the deed of the 2nd of August, 1872; secondly, if there has, whether the defendant is brought within the words of that covenant, he having merely joined in the deed of the 17th of May,

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(1) The plan shewed that this forty-foot road at the spot in question was intended to be laid out thus,—a carriage-way of 24 ft. 8 in., and a footway of five feet on either side, the rest being greensward or shrubbery inclosed by a dwarf-wall and iron railing.

1872, for conformity, and not as a party or privy in the sense contemplated by that covenant.

Now, the first point raises by far the most important consideration in the case. In order to determine that, it is necessary to look carefully at the words of the deed, to see what it is that was conveyed to the plaintiff. The obstruction cannot now be removed. It is not suggested that the damage is appreciable in money; but the parties are standing upon their legal rights. We have nothing to do with the merits; and, if the defendant has broken his covenant, however infinitessimal the injury sustained by the plaintiff may be, the action is maintainable. Now, the thing granted is admitted to be an easement. The limits of the right are ascertained by the deeds. According to the covenant entered into by Mr. Mitchell Henry with Lady Ashburton, the road is to be forty feet wide. It is enough to say that that covenant has been performed; a road of the stipulated width has been properly made. Now, what right or easement did the plaintiff acquire in reference to that road? A right for himself and his friends, servants, and workmen, to pass and repass over and along the roads or intended roads and ways delineated on the plan. It was pointed out in the course of the argument that that could not be an absolute grant of every part of the road for all the purposes mentioned; part must be set out for a carriage-way and part for a footway. What has the plaintiff got? As far as the carriage-way is concerned, he has all he bargained for, except that the bases of the columns supporting the portico incroach a little upon it. If this had been an absolute conveyance of a forty-foot road set out by metes and bounds, and a portion of it had been obstructed by the conveying party, no doubt an action might have been maintained for that trespass. But that is not this case; that which is granted is a right of way, an easement, over a road the soil of which remains in the grantor. All deeds are to be construed according to the intention of the parties as expressed therein: and we gather from the language of this deed that the intention was to grant the plaintiff an easement only, the reasonable use and enjoyment of an ascertained way; and it is not suggested that the plaintiff has not such reasonable enjoyment. Upon the statements in the special case, it does not appear that the plaintiff has not got in the fullest sense that which the deed purported to convey to him. If so, it follows that this action, which is brought upon the covenant by the defendant that he has not done, omitted, or knowingly suffered, or been party or privy to anything whereby that easement might be impeached or affected, cannot be sustained.

It becomes, therefore, unnecessary to consider what we should hold as to the second point. But, as the question has been raised before us, I may say that, if I had thought that the construction of the covenant was adverse to the defendant, I should have felt no difficulty in coming to the conclusion that he was party or privy to the deed by which the covenant had been infringed. He had notice of the contents of the deed of the 17th of May, 1872, and was a party and a necessary party thereto. If any authority were wanting upon this point, it seems to me that *Hobson* v. *Middleton* (1) is sufficient for the purpose. If, therefore, our judgment had been against the defendant upon the first point, it would probably have been against him upon the second point also.

Brett, J. I am of the same opinion. It is admitted that the portico cannot now be got rid of; and it seems that the plaintiff has sustained no real damage. As to the second point, I agree with my Lord that, if the plaintiff's rights have been infringed, the defendant was sufficiently party or privy to the deed under which that was done to make him liable. As to the first point,—that which is granted to the plaintiff by the conveyance of the 2nd of August, 1872, was, not a forty-foot road, nor the exclusive use of a forty-foot road; but a right to use it in common with others. He was to have an easement in the nature of an access or right of way over the road, by himself and his friends and servants, and nothing but an easement. If this were a grant of the road itself, any interference with the plaintiff's enjoyment of it would, no doubt, give a right of action. But all that is granted here is a right to a reasonable use of the road by the plaintiff in common with others, who have equal rights with him; and I am of opinion that no substantial interference with his exercise of that easement has been made out. The plaintiff's right has not been infringed at all. I would wish to guard myself from being understood to say that we should be justified in disregarding an interference with a right because the damage is inappreciable. Generally speaking, any interference with a *right*, however small, creates a cause of action.

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(1) 6 B. & C. 295.

Denman, J. I am of the same opinion. No doubt the defendant was party or privy to whatever was done under the deed of the 17th of May, 1872. Indeed, that point was hardly pressed by Sir John Karslake. I agree, however, with the rest of the Court that, upon the first point, the defendant is entitled to judgment. The main question is, what is the meaning of the covenant declared on. That was a grant to Colonel Clifford of the free right and liberty for himself, his friends, servants, and workmen, at all times at his and their will and pleasure, with or without horses, &c., to pass and repass over and along the roads or intended roads and ways delineated on the plan. Looking at the covenant and at the plan, I come to the conclusion that it was not intended to give to the plaintiff and to the other persons through him a right to go upon every square foot of the space so delineated, but only a right to the reasonable use of a way such as substantially existed over the spaces pointed out. It is only a grant of a reasonable user of a right of way. To hold otherwise would manifestly defeat the intention of the parties. Such being the nature and extent of the grant, what was done under the deed of the 17th of May, 1872, was not impeaching, affecting, or incumbering the plaintiff's right, and did not prevent the plaintiff from the full enjoyment of all that he stipulated for.

Judgment for the defendant.

Attorney for plaintiff: *G. C. Sherrard.*
Attorneys for defendant: *Bockett & Son.*

[IN THE EXCHEQUER CHAMBER.]

1874

May 13.

PEGGE *v.* THE GUARDIANS OF THE LAMPETER UNION.

Pauper Criminal Lunatic—Obligation of Guardians to maintain in Asylum—3 & 4 Vict. c. 54, s. 2—Parol Contract for Maintenance of Lunatic.

The 2nd section of 3 & 4 Vict. c. 54, provides that in the case of a pauper criminal lunatic removed to an asylum, an order of justices may be made on the guardians of the union comprising the parish of the lunatic's settlement to pay a weekly sum for the maintenance of such lunatic in the asylum.

A criminal lunatic having been removed to a private asylum under a warrant of the Secretary of State, in pursuance of 3 & 4 Vict. c. 54, the guardians of the L. union, to which the lunatic was chargeable, paid to the proprietor of such asylum the sum of 16*s.* a week for the maintenance of the lunatic for fourteen years; but they subsequently gave notice to the proprietor that they should not in future pay more than 11*s.* 1*d.* a week. To this reduction he refused to assent. The lunatic continuing in the asylum, the proprietor brought his action against the guardians to recover for the maintenance of the lunatic at the rate of 16*s.* a week. It was not shewn that there ever had been an order of justices under 3 & 4 Vict. c. 54, s. 2, as to the maintenance of the lunatic:—

Held, reversing the decision of the Court below, that it could not be inferred that the guardians had originally entered into a contract to pay for the lunatic at the rate of 16*s.* a week until she should be removed from the asylum, nor could it be presumed that an order of justices had been made under 3 & 4 Vict. c. 54, s. 2, upon the guardians to pay that sum.

APPEAL from the decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the plaintiff.

The facts of the case are fully set out in the report in the Court below. (1)

Kingdon, Q.C., for the defendants. The guardians are not liable in respect of the maintenance of the lunatic otherwise than in pursuance of the statute 3 & 4 Vict. c. 54. The plaintiff might have refused to receive the lunatic unless an order of justices were made fixing the sum to be paid for her maintenance. The effect of the judgment in the Court below is that, by making a payment for a short time, the guardians might be saddled with a perpetual liability. The guardians are a public body, acting only for certain statutory purposes, and cannot act otherwise than under the authority of the statutes by which their powers are conferred. Such a

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(1) Law Rep. 7 C. P. 366.

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contract as the Court below inferred would be ultra vires. If such a contract were lawful, it must be under seal: *Nicholson* v. *The Bradfield Union.* (1) There is no sufficient ground for presuming the existence of an order of justices as suggested by the Court below.

Sir H. James, Q.C. (with him *Pinder*), for the plaintiff. The consideration was an executed one, and the contract was within the ordinary scope of the duties of the guardians. There was ample evidence of a contract to pay 16*s.* a week as long as the lunatic remained in the plaintiff's asylum. It was competent for the guardians to waive the order of justices, which was only meant to provide for disputes as to the amount. The only way in which the guardians could put an end to the contract was by procuring the removal of the lunatic from the plaintiff's asylum.

Cur. adv. vult.

May 13. The judgment of Blackburn, Quain, and Archibald, JJ., and Cleasby, B., was delivered by

CLEASBY, B. This is an appeal from a judgment of the Court of Common Pleas. The case was tried before Baron Bramwell, at Bristol, when the following facts were admitted or proved:—A woman called Mary Hughes was indicted for murder at the Carmarthen summer assizes, 1847, and upon arraignment was found insane. Upon the 16th of October, 1856, the then secretary of state made an order authorizing and requiring the superintendent of the Vernon House Lunatic Asylum at Briton Ferry to receive her in custody at the said lunatic asylum, there to remain until further order. At that time a Mr. Leach was the proprietor of the asylum, but in 1864 the plaintiff became so. The lunatic was a pauper, and chargeable to the Lampeter Union. From the time she was admitted down to the autumn, 1869, the guardians of the union (the defendants) regularly paid for her care and maintenance in the asylum at the rate of 16*s.* a week. On the 19th of October, 1869, the defendants caused a letter to be written to the plaintiff, to the effect that they would not therefrom pay for her care and maintenance more than 11*s.* 1*d.* per week, such being the rate which they then paid for the maintenance of lunatics at the joint counties' asylum of Carmarthen. The plaintiff replied on the 22nd of October that his terms for pauper lunatics were 16*s.* a week. In February, 1870, the defendants wrote that they had been advised to resist this payment and were prepared to defend any action for a claim beyond 11*s.* 1*d.* per week. The action is brought to recover 40*l.* 14*s.* 4*d.*, for the care and maintenance of the lunatic from December, 1870, to 1871. The plaintiff admitted that, as to 10*l.* 8*s.* 9*d.*, being for the period from December, 1870, to March, 1871, the second plea was an answer; but insisted upon his right to recover 31*l.* 6*s.* 6*d.*, for the period between March, 1871, to December, 1871, being at the rate of 16*s.* a week. The defendants paid 21*l.* 12*s.* 3*d.* into Court, being at the rate of 11*s.* 1*d.* for the same period. The plaintiff claimed the difference, 9*l.* 14*s.* 3*d.* It was admitted by the defendants that 16*s.* a week was a reasonable sum to be paid to the plaintiff for the care and maintenance of the pauper lunatic. No order of justices, as required by 3 & 4 Vict. c. 54, was produced in evidence by the plaintiff. The learned judge directed a verdict to be entered for the defendants, with leave to the plaintiff to move to enter a verdict for the sum of 9*l.* 14*s.* 3*d.* A rule to shew cause was obtained in the Court of Common Pleas, which was afterwards made absolute, and this appeal is against that judgment. It will be found in Law Rep. 7 C. P. 366. The legal and proper mode of payment for a pauper criminal lunatic is prescribed by the statute 3 & 4 Vict. c. 54, ss. 2 & 3. It is thereby provided that two justices shall, by order under their hands, amongst other things, order that the guardians of a union shall pay such sum as they shall from time to time direct for the maintenance of the lunatic in the asylum in which he or she shall be confined. Upon this state of facts the Court of Common Pleas made the rule absolute, and they appeared to consider that it was either a proper inference from the facts stated, that the guardians had entered into a contract to pay 16*s.* a week for the pauper's maintenance, to continue until they had obtained an order from the justices to alter the rate of payment, or that the facts now warranted the conclusion or presumption that there was in point of fact an order of justices to pay after that rate. With respect to the latter view, it appears to us that no such

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(1) Law Rep. 1 Q. B. 620.

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conclusion or presumption could be properly arrived at with respect to a matter so recent and capable of proof as the supposed order of justices. The payment of 16*s.* a week during the period named was completely accounted for by the liability of the defendants to pay something, and by the fact that 16*s.* a week was a reasonable sum for them to pay, and the sum which the plaintiff demanded and the defendants assented to, until the letter of the 29th of October, 1869. And further, the plaintiff, by his letter of the 22nd of October, rests his claim, not upon any order of justices, but upon his terms being 16*s.* a week. With respect to the inference of the particular contract just mentioned, it appears to us that there is no sufficient ground for making it. The guardians had no legal right to enter into such a contract; it was their duty to act upon the statute, and no inference or presumption should be drawn that they acted contrary to law. In our opinion, the just and reasonable inference from the facts as stated is, that the guardians, knowing that they were liable to pay for the maintenance of the lunatic, paid the sum of 16*s.* per week, being a reasonable and proper sum, without any order of justices at all, and that it was competent for them at any time to put an end to their liability for that payment, and put upon the plaintiff the necessity of obtaining an order of justices. The guardians did not place the pauper lunatic in the asylum of the plaintiff or of his predecessor. The plaintiff fails in making out a case for 16*s.* a week, because he cannot rest it upon contract, as the defendants did not agree to it; and he cannot rest it upon legal liability independent of contract, because the order of justices, which is the proper foundation for such liability, is wanting. A second objection was made on behalf of the defendants, that, assuming the inference to be a proper one that the defendants had contracted to pay 16*s.* a week until they obtained an order of justices to vary the amount, the contract should have been under seal to be binding upon the corporation. After what has been said, it is unnecessary to give any decision upon this objection. The result is, that in our opinion the judgment of the Court below must be reversed.

KELLY, C.B. I agree so far in the judgment of the Court of

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Common Pleas, that it was competent to the defendants to waive the order by the magistrates specifying the amount to be paid to the plaintiff for the maintenance of the pauper lunatic in question; and that they did so waive that order, and agree to pay 16*s.* a week to the plaintiff. But I am likewise of opinion that they were entitled to put an end to the agreement upon notice given, and that they have done so by their letter of the 19th of October, 1869. It appears to me that it then became incumbent on the plaintiff to obtain an order under the statute that the defendants should pay such sum as the magistrates might determine to be a proper sum, and that until such order should be obtained the defendants were not nor are under any liability to pay more than the 11*s.* 1*d.* which they have proposed to pay. No point was made as to whether the defendants might not have been bound to continue the payment of 16*s.* a week, in case the plaintiff had applied for an order of the magistrates, until they should have had time to make the necessary inquiries; and as the plaintiff has never applied to any magistrates for any such order, or given notice to the defendants of any intention to do so, I am of opinion that the agreement is at an end, and that the plaintiff is not entitled to more than the 11*s.* 1*d.* a week. The judgment of the Court of Common Pleas must therefore be reversed.

Judgment reversed.

Attorneys for appellants: *Humphries & Morgan, for David Lloyd.*

Attorney for respondent: *Wrentmore, for Jones & Carter.*

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May 13.

[IN THE EXCHEQUER CHAMBER.]

WINCH *v.* THE CONSERVATORS OF THE THAMES.

App Cas
259
Ex D. 124
Ch D. 388
399
Ex D 31
App Cas
659
1 QBD 498

Negligence—Corporation—Public Purposes—Liability to repair Towing-path.

The defendants were a corporate body, in whom were vested, by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), certain powers and authorities for the preservation and improvement of the stream, bed, and banks of the upper part of the Thames, including all powers and authorities before that Act vested in the commissioners appointed for the purposes of the upper navigation of the Thames under earlier statutes. From these statutes it appeared that there were originally towing-paths on the river banks, the owners of which took tolls for the right of passing along them, and that by such statutes the commissioners had extensive powers of supervision and control over the towing-paths and of regulating the toll to be taken. They subsequently acquired by the statutes power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation; and by the Act of 28 Geo. 3, c. 51, s. 6, were authorized themselves to take toll for, amongst other things, the towing-paths purchased or hired by them. By 35 Geo. 3, c. 106, ss. 18, 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing-path throughout the navigation, and to purchase land for that purpose. By the Thames Navigation Act, 1866, the defendants were authorized to take tolls and apply their funds to the expenses of the repair of the works vested in, acquired by, or constructed by them under the Act, and to the carrying into execution of the purposes of that Act and of the former Acts.

In consequence of a part of the towing-path on the upper navigation of the Thames being out of repair and giving way, some horses of the plaintiff which were engaged in towing a barge fell into the river and were drowned. The defendants had, in pursuance of the powers vested in them in 1866, made a parol arrangement with the owner of the soil of the towing-path at the place in question for the use of such towing-path, at an annual rent. Some parts of the towing-path along the river had been artificially constructed by and belonged to the defendants, and the use of the whole of the remainder had been acquired by them. They were in the habit of taking an aggregate toll for the use of the whole of the navigation and towing-path at Teddington Lock, which they had done in the present instance. The plaintiff having brought an action against the defendants for negligence in not keeping the towing-path in repair:—

Held (by Blackburn, Quain, and Archibald, JJ., and Bramwell, B., Cleasby, B., dissenting), affirming the judgment of the Court below, that even assuming that no obligation was cast upon the defendants by their statutes to repair parts of the towing-path not constructed by or vested in them, so long as they kept the towing-path open and took toll for its use, they were under an obligation to those whom they invited to use it to take reasonable care either to see that the towing-path was in such a state as not to expose those using it to undue danger, or to give due warning against such danger, and that no distinction could be made in this respect between such parts of the towing-path as were natural and such as were artificial.

APPEAL from the decision of the Court of Common Pleas discharging a rule to enter a nonsuit or verdict for the defendants.

The facts sufficiently appear from the report of the case in the court below (1) and the judgments.

Feb. 4. *Prentice, Q.C.* (with him *Joyce*), for the defendants. The liability of the defendants must depend wholly upon the interpretation of the statutes under which they are constituted. No duty was cast upon the defendants by the statutes from which they derive their powers to repair the towing-path generally; neither an absolute duty nor a duty to use due diligence. The cases that have been relied upon by the plaintiff were all cases of artificial constructions which the defendants were empowered by statute to construct, and for the use of which they were empowered to take tolls. This is the case of a public navigable river; with regard to any part of the towing-path which may be an artificial construction made by the defendants under the powers of their Acts, it may be they would be bound to repair, but they are not bound to repair the towing-path in general. The soil of it is not vested in them. Formerly private owners received the tolls for passing over such portions of the towing-path as belonged to them respectively. For the general convenience, and to prevent extortion, the defendants are empowered to receive one toll for the whole, and do so. But the owners were not bound to repair the towing-path; they received the toll for the licence to pass, and were entitled to say to those using it, You must take it as you find it. The powers of the defendants are of a discretionary character for the improvement of a public natural navigation. If obstructions arise in the bed of the river from natural causes, as, for instance, by the formation of shoals, surely it could not be contended that there was any obligation on the defendants to remove them.

Assuming that the statutes cast no obligation on the defendants to repair, the mere taking of a toll would not. That is merely for a licence to pass over the land in its natural state.

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(1) Law Rep. 7 C. P. 458.

The cases are distinguishable where the defendants, knowing that a place is dangerous, invite the plaintiff, who does not know that it is so, to enter and charge a toll. Here the defendants had no knowledge of the defect in the bank.

[Blackburn, J. Negligent ignorance of it would be sufficient. It must be taken, after the finding of the jury, that the defendants were negligent. *Parnaby* v. *Lancaster Canal Company* (1) seems to be in point.]

That was the case of a canal, an artificial construction. The towing-paths are in the nature of highways, which the public are entitled to use on payment of tolls. If so, the defendants are not bound to repair them any more than the trustees of a turnpike road are bound to repair such road: *Rex* v. *Inhabitants of Netherthong.* (2) [He also cited on this point *Mersey Docks* v. *Gibbs.* (3)]

Secondly; the place where the accident happened was no part of the towing-path proper, i.e., the place where the bank gave way was not in the usual beaten track which the horses follow. It was part of the natural bank, between such beaten track and the river. It is contended that there is no liability in any case to repair more than the towing-path proper.

McLeod (with him *English Harrison*), for the plaintiff.

[The Court intimated that he need not argue with reference to the second point taken by the defendants' counsel.]

A private individual or ordinary trading company that had done what the defendants here did would be liable to this action. The principle of the recent decisions is, that a corporation or public body is in such cases primâ facie subject to the same liabilities as a private person. It is, therefore, on the defendants to shew that they are exempt from what would generally be the obligation of a public body in their position. Therefore, unless there is something special in the statutes under which the defendants are constituted to exempt them, they must be liable.

There is no such essential distinction between an artificial and a natural place as that contended for by the defendants. If a man carried on business in a place naturally dangerous, and invited

(1) 11 A. & E. 223.
(2) 2 B. & Ald. 179.
(3) Law Rep. 1 H. L. 93. /12 Jur. N.S. 571/

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persons to come there without warning, he would be responsible if an accident happened. The commissioners had full powers to repair, and they might have ordered the owner to repair. There is no distinction between the banks of a river and those of a canal for this purpose. Though part of the towing-path may consist of the natural soil, the navigation must be looked at as a whole, and taken as a whole it is artificial. It could not exist but for artificial constructions such as locks. If there were two artificial bridges ten feet apart, and a piece of towing-path between them consisting of the natural soil, would it not be absurd that the liability should be different in respect of the bridges and the piece of towing-path?

If the defendants, under the provisions of their statutes, have acquired a towing-path in part by constructing it artificially, and in part by availing themselves of the natural soil in conjunction with such artificial construction, and have invited the public to use it on payment of toll, they are liable just in the same way as they would have been if the whole was an artificial work which they allowed the public to use on payment of tolls.

It is clear from the provisions of their statutes that if they had acquired, as they might do, the whole of the towing-path, they would be liable to repair. It is true that they had not in this case purchased the towing-path, but they had acquired the right of user, and the whole was actually in their possession and control, under the provisions of their statutes.

[BRAMWELL, B. Suppose the defendants came to the conclusion that a part of the towing-path did not pay for the expense of repair, and gave notice to the public that it was out of repair, but they might use it at their peril, could any steps be taken to compel them to repair?]

They might be compelled by mandamus. They are bound to repair such works as they may have constructed or acquired.

Prentice, Q.C., in reply, cited *Badger* v. *South Yorkshire Railway Co.* (1); *Nicholl* v. *Allen.* (2)

Cur. adv. vult.

(1) 1 E. & E. 347; 28 L. J. (Q.B.) 118. 5 Jur NS 459

(2) 1 B. & S. 916, 934; 31 L. J (Q.B.) 43, 283.

May 13. The following judgments were delivered:—

CLEASBY, B. This is an appeal from a decision of the Common Pleas discharging a rule to enter a nonsuit or verdict for the defendants. The rule (which was granted by leave reserved) was to enter the verdict on the ground that there had not been shewn any liability on defendants' part to repair or keep in proper condition the spot where the bank gave way. The question, therefore, is one of great importance both to the defendants and the public, involving, as it does, the responsibility of the defendants for the safe and proper condition of many miles of towing-path (it may be a hundred miles or more), of which we know parts are periodically covered by floods and other parts encroached upon by the action of the stream. It appears to me that the liability of the defendants depends wholly upon the construction of the various Acts of Parliament under which they exercise their powers for the improved navigation of the river. I quite agree that if certain duties are imposed upon the defendants, the circumstance of their being a public body, receiving their powers for public purposes only, does not protect them from the consequences of the neglect of their duties if danger arises to any person by the neglect. This is settled by the *Mersey Docks* case. (1) I also think that if the defendants could be regarded as having the towing-paths all along the river under their control and management, and inviting the public to make use of them upon payment of tolls to them, then if this was done with knowledge that the towing-path was insecure, or with this means of knowledge not attended to, there would still be responsibility. *Parnaby* v. *Lancaster Canal Co.* (2) But the question in the present case is whether the conservators occupy this position at all. Because if the public use the towing-path, not by the permission of the defendants, who could either grant or withhold it (except in certain portions of it where they have purchased the ground and constructed works requiring reparation), but in the same right as they did originally and before the commissioners existed, then there is no responsibility, and the public went on the path at their peril. It is necessary, therefore, to examine the Acts of Parliament. It will, no doubt, be found that the de-

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(1) Law Rep. 1 H. L. 93. 12 Jur
NS 571

(2) 11 A. & E. 223.

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fendants have certain powers connected with the towing-path, and that they have power to purchase land and construct towing-paths and other works in such parts as they in their discretion think necessary for the purposes of the navigation; and wherever they have constructed a towing-path or works for the use of the public, they would be under an obligation to take care that they are not in a dangerous state. There is nothing in the case to shew to what extent this has been done; indeed, the case, as it is called, is so imperfect, merely setting out a quantity of evidence, that in my opinion it ought to go back to be properly stated; but taking the case as it is, there can be little doubt that the towing-paths and other works, the property of the defendants, would occupy a very insignificant part of the great distance between Staines and Cricklade. In other parts of the line of navigation the powers of the defendants extended to take care that the public had the undisputed use of the existing towing-paths without payment to the owners of the land (which had formerly led to great exactions), and as, in the present case, it is not disputed that at the place where the injury was sustained from the defective state of the towing-path the defendants had not constructed the towing-path, or in any way interfered with it, except by agreeing with the owner for a price to be paid for the privilege of going over it, the question which arises is, what is their position and responsibility as regards this portion of the towing-path? The defendants are conservators of the upper part of the river by virtue of 29 & 30 Vict. c. 89. The Act transfers to them the property and powers of the former commissioners. Two sections of the Act were particularly referred to in the argument, ss. 43 & 88. The first directs that the conservators shall repair the locks, weirs, and dams, no mention being made of towing-paths, and the latter one enacts that the moneys raised by the conservators shall be applied (inter alia) in the maintenance and repair of the works vested in them, or acquired or constructed under the Act. This, it was contended, would extend to all cases in which they had purchased land and constructed towing-paths, but not to the miles of towing-paths along the river in which they had no interest. All that can be said of this Act of Parliament is, that it treats the works of the conservators as repairable by them, but not the whole length of the towing-paths. It cannot be regarded as a legislative declaration that the towing-path is not repairable, or it would be conclusive of the present case, but it affords a strong argument in favour of that view. The earlier Acts must therefore be referred to, and in examining these, the earliest Act, 24 Geo. 2, after reciting, among other things, that abuses are committed by the owners of the towing-paths, and by reason of such exactions the expense of water carriage is increased, authorizes certain commissioners to settle the rates to be taken by the tenants of the land for the use of the towing-paths (s. 2), and also prevents any alteration of the towing-paths without the consent of the proprietors of the land. Under this Act it seems quite clear that the commissioners appointed by it were under no liability as regards the condition of the towing-paths.

The 11 Geo. 3, c. 45, after reciting, among other things, that exactions by the owners of the towing-paths still continue, enacts that, for completing the navigation and for preventing abuses and exactions, all the principal inhabitants of all those counties through which the river passes, and the members for all the counties and mayors of all the boroughs, shall be commissioners for putting this Act into execution. These commissioners, who may be said to represent the public interested in the navigation, are (by s. 7) authorized to purchase lands and purchase and make towing-paths, bridges, and ways for the towing and hauling of barges, and to fix rates to be paid for the use of towing-paths, regard being had to the expense of purchasing the land and making and maintaining the said towing-paths. It seems clear that this clause enables the commissioners to construct such works as bridges, carrying the towing-paths over brooks and ditches, and also to construct towing-paths on land purchased when they considered this necessary for the use of the navigation. And as to all those works belonging to them there would be a duty to maintain them, but it does not apply to the great length of towing-paths in which they have no interest, and which they consider that they may have as before. In like manner, s. 19, which was much relied upon by the plaintiff, and which enables the commissioners to view the towing-paths and the condition, reparation, and circumstances thereof, does not impose upon the commissioners any obligation as to the towing-paths, but enables them to ascertain where it may be necessary to construct bridges or towing-paths, and to make certain orders upon the owners relating to the tolls, and also, perhaps, as to the towing-paths, but certainly not so as to call upon them to repair them. Sect. 31 shews that this Act relates to the making of new towing-paths. The next Act bearing on the question is 28 Geo. 3, c. 51, which, after reciting that a certain sum has been spent for making horse towing-paths, enacts (s. 2), that all towing-paths and bridges, &c., made on the said navigation, and the ground and soil whereon the same are made, provided the same have been purchased by the commissioners for the use of the navigation, shall be vested in the commissioners. As far as I can see, the commissioners have no interest in the other towing-paths all along the river from Staines to Cricklade, and no power to deal with them as their property. And it appears by paragraph 16 of the case that the owners of the land and their tenants continued to occupy and use the land between the fence and the water by cutting the grass or turning sheep upon it, though they let the right to pass along it. By the 7th and 19th sections of the Act already referred to, 11 Geo. 3, c. 45, there is an authority given to the commissioners to make orders relating to the towing-paths, giving compensation to the owners for the loss which they may sustain. And this authority has been acted upon, as appears by the evidence of Mr. Leach, the engineer, at paragraph 36, who says: "If I find a towing-path too narrow, I apply to the owner to set the fence back."

There is no power to compel the owners to repair the towing-paths, nor any authority to the defendants to repair them-selves; and they never appear to have done so, though as regards the bridges and works of that description belonging to the commissioners, they appear to have repaired them regularly (see paragraph 15 of the case). Much reliance was placed upon the 6th section of 28 Geo. 3, by which the commissioners are authorized to take tolls for the use of, among other things, the towing-paths already made or hereafter to be made, purchased, or hired for the purpose of the navigation, and it was argued, with some apparent force, that, as the public were to pay tolls to the commissioners for the towing-paths hired by them, as well as for those purchased and made by them, it followed that the commissioners were as much bound to see to the repairs and condition of those hired as of those made. And if the proper meaning of the word "hired" was leased, so as to give an interest in the soil, this might be so, but it is plain that the meaning of the word "hired" is, that the right of passage is hired only so as to relieve the barge-owners from paying to the several landowners, as was done in the present case. See paragraph 16, where Mr. Evans, says: "No part of my land was ever sold or let to the commissioners, but only the right of passing over." It appears to me that the section referred to has not the effect contended for. In the first place, it was not intended by this section to give any additional rights to the public as against the commissioners, and so heavy a responsibility as the repair of the whole length of the towing-paths ought not to be imposed indirectly, but by clear words. The owners of the land were not liable to the public in respect of the condition of the towing-paths, and the commissioners, by merely hiring the right of passage, cannot be properly held to create and take upon themselves a new responsibility. Besides, the commissioners, by hiring the right of passage, acquire no rights upon the adjoining lands so as to go upon them and use them for the purpose of repairing the towing-paths. I cannot see why the licence granted to the commissioners to use the towing-paths might not be revoked, and thus how could the liability in respect of the condition of these continue?

The only other clause in the Acts of Parliament referred to as bearing on the present question was 35 Geo. 3, c. 106, s. 23. That section, after reciting that it would greatly conduce to the benefit and advantage of the said navigation if a free, continued, uninterrupted, and public horse towing-path were made and established throughout the whole navigation, enacts that it shall be lawful for the commissioners to purchase and take any such horse towing-paths as the commissioners shall think convenient and necessary for the navigation. This is merely an enabling clause, and leaves it to the discretion of the commissioners to make horse towing-paths, but as regards the old towing-paths, which they

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deem sufficient, and do not interfere with, it leaves their responsibility as it was before. For the reasons given, I think the commissioners were under no responsibility for the condition of the whole length of the towing-path. It was argued that there was an inconsistency in holding that they are responsible for some parts, but not for the rest; but I do not think so. In so far as they have constructed bridges, towing-paths, and other works to be used by the public, they are responsible for their being in a fit condition for use, but there appears no sound reason for holding that because they have purchased land and have constructed certain works, a bridge, for instance, over a brook, of the length of ten yards, for which they are responsible, that they are therefore responsible for miles of towing-path adjoining, in which they have no interest. Bearing in mind that portions of the towing-paths are at certain seasons covered with floods, the responsibility is a very serious one, and ought to be imposed by much clearer words than are found in the Acts of Parliament, and the payment of one toll for the use of the navigation and liberty to pass over the towing-paths without separate payment is only a convenient arrangement for the public, and ought not in any way to affect the question of liability. The question may be further illustrated thus: when the floods are out and the towing-path covered, is it the duty of the conservators to give notice of this, or must the public look out for themselves? And so, when the floods are subsiding, and when they have just subsided and the ground has not regained its firmness and consistency for use as a towing-path, are the conservators to give notice of this or stop the use of the towing-path? I think not. The judgment of the Court not only decides the present case, but imposes a charge on the defendants if decided in favour of the plaintiff. On that account, having satisfied myself that the charge ought not to be imposed, I feel bound to say so, though hesitating and unwilling to differ from so many of my learned Brethren.

The judgment of Bramwell, B., and Blackburn, Quain, and Archibald, JJ., was read by

BRAMWELL, B. The defendants' rule in this case was to enter

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a verdict for them on the ground "that there was no evidence that they were bound to repair the spot where the accident happened." If this were the question in the case, it might be difficult to answer it adversely to the defendants, and say that they were bound to repair the spot in question. For undoubtedly when the towing-paths were in the hands of, and the tolls for them were taken by, private owners there was no such obligation, and none is imposed by the statutes in express terms on the defendants; and it may be that if the defendants, as a matter of judicious use of their funds, might think it inexpedient to be at what might be the enormous and unprofitable expense of repairing long extents of towing-paths where there was scarcely any traffic, there is no power of compelling them, or they would not be compelled to such enormous outlay. We do not go further into this question, as we think it is not the question; but we refer to the judgment in *Mersey Docks* v. *Gibbs.* (1) But we think it is enough to support this verdict if the defendants were, so long as they kept the towing-path open and took toll for its use, under an obligation to those whom they invited to use it to take reasonable care to see that the towing-path was in such a state as not to expose those using it to undue danger. If the dangerous state of the path at this spot had been latent, so that the defendants, though using reasonable care, remained ignorant of it, or if, having found it out, they had warned the plaintiffs of it, they would not have neglected this duty; but as it is, if such were the duty of the defendants, the finding of the jury (which we must here take to be correct) is, that they have neglected it. We agree with the Court below in thinking that since the case of *Mersey Docks* v. *Gibbs* (1) we must hold the funds of this corporation (though established for public purposes) liable to make good the damages sustained by a private person from any breach of duty on their part, and that there is nothing in these statutes to exempt this corporation from the duties which the common law would cast upon a private person or trading corporation who maintained a similar towing-path along a public navigation, and levied tolls for its use. And we think that *Parnaby* v. *Lancaster Canal Company* (2), and

(1) Law Rep. 1 H. L. 93. / 12 Jur NS 571

(2) 11 A. & E. 223.

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Mersey Docks v. *Gibbs* (1), establish that such a duty is by common law cast upon those who invite persons to use a towing-path like this, and receive pay for the use of it. It was argued that those cases were not applicable, because the part of the towing-path where the accident happened was on the natural soil only worn into a track made by the horses' feet leading from a bridge over one ditch to a bridge over another, and it was argued that the common law only imposed this duty on those who maintained artificial works, such as canals, or docks, or bridges. We wish to guard against being supposed to decide that in every case where a licence is given for money to go over land in its natural state this obligation results. Much may depend on the circumstances of each case. But we think that in this case, where persons pay one toll for the use of one entire towing-path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the path to take reasonable care of the artificial and the natural parts, or at least to warn those who use them of defects in them. The defendants can in future, if they think fit, announce to those who pay the tolls that they must take the paths as they find them. If this is done, there could be no liability for a defective state of repair, even though wilful. Whether if they gave such notice, and left the banks unrepaired, they could be compelled to repair them, is a question that could then be directly raised and decided.

Judgment affirmed.

Attorneys for plaintiff: *Wilkinson & Howlett.*
Attorney for defendants: *Hall, for Frere & Co.*

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(1) Law Rep. 1 H. L. 93./12 Jur NS 571

1874
May 11.

[IN THE EXCHEQUER CHAMBER.]

STANTON *v.* RICHARDSON.
RICHARDSON *v.* STANTON.

Ship and Shipping—Charterparty—Warranty of Seaworthiness—Condition Precedent—Ship unfit for Cargo—Obligation of Shipowner.

QBD. 381.

A charterparty provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods. It likewise specified different rates of freight for dry and wet sugar. The usual words as to the vessel's being tight, staunch, and strong were not in the charter, but it was provided that the vessel should be a good risk for insurance before and when receiving cargo, and that the master should provide a survey report declaring her to be so. The ship proceeded to her port of loading, and having been surveyed was reported to be a first-class risk. A cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from wet sugar, and when the cargo had been nearly all shipped it was found that there was an accumulation in the hold, the result of drainage from the sugar mixing with the ordinary leakage of the ship, which the pumps were unable to deal with from the nature of the material, and which rendered the ship unseaworthy for the voyage if she proceeded in her then condition. The ship was perfectly seaworthy, except with respect to this particular kind of cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or provide any other cargo.

Cross actions were brought, the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.

At the trial the jury found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps and with a reasonable cargo of wet sugar on board, have been seaworthy:—

Held, affirming the decision of the Court below, that the shipowner by the charterparty undertook that the ship should be fit for the carriage of a cargo of wet sugar, and that the charterer was entitled to succeed in both actions.

Affirmed by H of L.

APPEAL from the decision of the Court of Common Pleas discharging rules to enter verdicts for the shipowner.

These were cross actions upon a charterparty between the owner and charterer of a ship called the *Isle of Wight*. The Court below gave judgment in favour of the charterer in both actions. The pleadings and facts are fully set out in the report of the case in the Court below. (1)

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(1) Law Rep. 7 C. P. 421.

A. L. Smith (*Ridley* with him), for the shipowner. There is no warranty in this charter that the ship shall be seaworthy to carry a cargo of wet sugar. The usual words, "tight, staunch, and strong" are left out in the description of the vessel, and the only express warranty is that the ship, before and when receiving cargo, shall be a good risk for insurance, and that a survey report shall be provided declaring her to be so. That warranty was complied with, and it is submitted that there can be no implied warranty, on the principle that expressum facit cessare tacitum: *Dickson* v. *Zizinia.* (1)

[Cockburn, C.J. I do not see here that the express warranty necessarily would exclude an implied warranty that the vessel was seaworthy for the purpose for which she was chartered. It is something superadded by way of additional protection to the charterer.]

The words "tight, &c.," are so usually inserted in charterparties that it would seem probable that they were deliberately left out with a purpose. It might be that the shipowner, knowing that the ship was going to Yloilo, and might have a cargo of wet sugar tendered for which she was unfit, expressly declined to stipulate for her fitness.

[Cockburn, C.J. Had the words "tight, &c.," been struck out of a printed form?]

No; they were simply omitted. The shipowner might be bound to take some wet sugar, but he was not bound to take a whole cargo of wet sugar. He was only bound to take so much wet sugar as the ship might be seaworthy to carry. It is a strong proposition to say that the shipowner was bound to have pumps fit to pump out a certain proportion of the cargo itself, and that, because they were not fit to do that, the ship was unseaworthy.

The second question is, whether the unfitness of the ship to carry wet sugar was a breach of a condition precedent, entitling the charterer to throw up the charterparty. It was not so. Assuming that there was a stipulation that the ship should be fit, it was merely a collateral stipulation. There is no total frustration of the adventure. The charterer had the option of offering five sorts of cargoes; any of those sorts but wet sugar the ship could have taken.

[Mellor, J. Your contention deprives the charterer of the option expressly given to him by the charter.

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(1) 10 C. B. 602; 20 L. J. (C. P.) 73.

COCKBURN, C.J. The master was obliged to unload the cargo for the safety of the ship, and it was shewn that it would have taken a long time to make the ship fit for a cargo of wet sugar.]

[He cited *Tarrabochia* v. *Hickie.* (1)]

Sir J. Karslake, Q.C. (with him *Butt, Q.C.*, and *J. C. Mathew*), for the charterer, was not called upon.

COCKBURN, C.J. I am of opinion that the judgment of the Court below should be affirmed. If the words upon the omission of which so much stress has been laid had been struck out purposely, there would perhaps have been more ground for the argument based upon their omission. But looking to the whole of the charterparty together it appears to be an engagement on the part of the shipowner to carry a cargo of dry or wet sugar, because, although at first sugar simpliciter is mentioned, subsequently among the rates of freight the rate for wet sugar is specified, which imports an option on the charterer's part of loading either wet or dry sugar. A cargo of wet sugar was offered. The captain shipped it as he was bound to do. He then discovered that the pumps, though fit for the ordinary purposes of the ship, were inadequate for this cargo, the drainage from which, mixing with the ordinary leakage of the ship, formed a viscous matter which the pumps were unable to discharge. The cargo had consequently to be discharged. The shipowner was bound, I think, under this charterparty, to have his ship fit to take a cargo of wet sugar, and the ship was unable to do so; there is, therefore, a breach of the shipowner's engagement. It is true he offers, after discharging the cargo, to make the ship fit to take a cargo of wet sugar, but it is admitted that that would take him months. In the meanwhile the cargo had to be sent to Europe by another ship. For these reasons I think the judgment of the Court below was right.

MELLOR, J., and BRAMWELL, CLEASBY, POLLOCK, and AMPHLETT, BB., concurred.

Judgment affirmed.

Attorneys for shipowner: *Shum & Crossman.*
Attorneys for charterer: *Walton, Bubb, & Walton.*

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(1) 1 H. & N. 183; 26 L. J. (Ex.) 26.

WILLIAMSON *v.* FREER.

1874
April 20.

Libel—Privileged Communication—Post-office Telegram.

The transmission unnecessarily by a post-office telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege.

THIS was an action for a libel, tried before Brett, J., at the last assizes for Leicester. The facts were as follows:—The plaintiff was employed as assistant in the shop of the defendant, a shoemaker, at Leicester. The defendant having accused the plaintiff of robbing him of money, sent two post-office telegrams to her father, who resided in London, to inform him of his suspicions. The first telegram was to this effect,—"Come at once to Leicester, if you wish to save your child from appearing before a magistrate." The second was as follows:—"Your child will be given in charge of the police unless you reply and come to-day. She has taken money out of the till."

The charge was persisted in down to the trial; but there was no evidence to support it. It did not appear that, beyond the officials of the post-office, through whose hands the telegrams passed, they had come to the knowledge of any other persons than the father, mother, and brother of the plaintiff.

On the part of the defendant it was contended that the messages if sent in sealed letters would clearly have been privileged communications, and that they did not lose their privilege by being transmitted by telegraph.

The learned judge told the jury that, although the statements, if made bonâ fide and without malice, would have been privileged if they had been contained in letters addressed to the father, they might be, if libellous, deprived of that privilege by being sent by telegraph. And he left it to the jury to say whether the statements were libellous, and whether it was reasonable to transmit them by telegraph rather than by post.

The jury found that the statements were libellous, and that it was not reasonable to send them by telegraph, and they returned a verdict for the plaintiff, damages 100*l.*

O'Malley, Q.C. (with him *Merewether*), pursuant to leave, moved to enter a verdict for the defendant; he also moved for a new trial on the ground that the damages were excessive. If these communications would have been privileged if contained in a sealed letter, they are equally so when sent by telegraph. A telegram is as much protected by the seal of secrecy as a sealed letter; for, the 20th section of the Telegraph Act, 31 & 32 Vict. c. 110, makes it a misdemeanor in any employee of the telegraph department to disclose the contents of a telegram.

[LORD COLERIDGE, C.J. Is it not always for the jury to say whether or not the circumstances take the communication out of the protection of privilege? A telegram must necessarily be open to many persons; it stands upon a totally different footing from a sealed letter.]

If the question had been left to the jury, they would not have found express malice.

[BRETT, J. They found that it was not reasonable to send the accusations by telegraph. It cannot be said that there was no evidence of malice.]

At all events, the damages were more than commensurate with any injury the plaintiff could have sustained.

LORD COLERIDGE, C.J. I think there should be no rule in this case. It would be extending the doctrine of privileged communication to a most alarming degree if the transmission of a telegram were put upon the same footing as that of a sealed letter. Although the clerks are prohibited under severe penalties from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them. With regard to the damages, my Brother Brett does not express dissatisfaction; and I see no reason for thinking them at all excessive.

BRETT, J. I reserved the point because I thought it was a very important one. It is whether, where a communication is to be made to a relative of a person against whom a charge is preferred, which communication would be privileged if sent by letter in the ordinary way, the privilege is not lost by sending it in the form of a telegram,—whether a communication in that form can be said to be made to one person, when in point of fact it passes through several hands before it reaches its ultimate destination. Privilege is not wanted unless the publication is libellous. The question then is whether the character of an innocent person is to be destroyed because the libeller thinks fit to send the libel in this shape rather than in a sealed letter. I do not mean to say that there was malice in fact here. But I agree with my Lord that sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to put this higher. I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card. It was never meant by the legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels. Where there is such a publication, it avoids the privilege, because it is communicated through unprivileged persons. As to the damages, I am not at all disposed to think them excessive. The charge against the plaintiff was of a very grave character. It was made with considerable severity, and it was insisted upon even down to the trial.

DENMAN, J. I am of the same opinion. For the purposes of this case we may assume that the communication would have been privileged if sent by post. Still it was injurious, and clearly libellous; and it could only be privileged if made in the course of some duty, whether legal or social, to the party himself or some third person. Here, it can hardly be said that making the charge known to the clerks in the telegraph office was a thing done in performance of a duty. With regard to the damages, I see no ground for thinking them excessive.

Rule refused.

Attorneys for defendant: *Field, Roscoe, Osbaldeston, & Co., for Stevenson, Leicester.*

1874
April 21.

DAVIS *v.* DUNCAN.

Libel—Privilege—Fair Comment on Matter of Public Interest.

[illegible]
CPD 2/16

The conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in Parliament, may be made the subject of fair and bonâ fide discussion by a writer in a public newspaper, and unfavourable comments made upon such conduct in the course of such discussion are privileged.

Declaration for a libel.

Pleas: Not guilty, and that the libel was true. Issues thereon.

The trial took place at the Gloucester Spring Assizes, before Lord Coleridge, C.J., and the facts were as follows:—

The plaintiff was a clergyman of the Church of England, residing near Swansea, and the defendant was the proprietor of the *South Wales Daily News*, in which the alleged libel was published. It appeared that at the time a contested parliamentary election was pending at Swansea. The plaintiff and two other clergymen of the Church of England had gone to Swansea together for various purposes, and when there intended to go to an election meeting in favour of the Conservative candidate, of whom they were supporters; but finding that that meeting was not to be held, and hearing that the Liberal candidate was to address a meeting, they were prompted by curiosity to go to such meeting.

The alleged libel related to what took place at the meeting, and was as follows:—"In our yesterday's issue we reported two successful meetings held by Mr. Dillwyn at Morriston and Landore. After the departure of our telegram we learn with regret that an unseemly scene took place at the Landore meeting. Just before the close of the meeting three members of the Established Church clergy made an appearance in the chapel, two of them having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the chapel also led one to such a conclusion. One of the reverend gentlemen essayed to speak, but met with a reception that was anything but pleasant. Persisting in interrupting the meeting, the headstrong supporters of the blue candidate were handed over to a couple of gentlemen in a uniform of that colour, and who had considerable difficulty in protecting the reverend gentlemen when they got outside, as the crowd were so incensed at the disturbers, and were anxious it would seem from their conduct to give them some punishment, which they unquestionably deserved. Such a proceeding on the part of ministers of the gospel cannot be too highly condemned, and it is to be hoped that the reverend gentlemen alluded to will receive such a reprimand from their superiors as will prevent similar disgraceful occurrences."

Evidence was given shewing that a disturbance had taken place at the meeting in consequence of the presence of the plaintiff and his two companions, and of the circumstances connected with such disturbance. There appeared to be no ground for supposing that they were really the worse for liquor, but the defendant's witnesses deposed that they were much excited, and that their conduct was such as might have given rise to the supposition that they were.

The learned judge in summing up in substance directed the jury to consider (inter alia) whether the statement in the paper exceeded the limits of a fair and bonâ fide discussion by a writer in a public newspaper of a matter of public interest. He left three questions to the jury: 1st. Whether the statement was a libel; 2ndly. Whether the fair limits of the right of discussion of a matter of public interest had been exceeded; and, 3rdly. If so, whether the statement was true.

The jury found generally for the defendant.

Huddleston, Q.C. (with him *Bosanquet*), moved for a rule nisi for a new trial on the ground of misdirection. The learned judge misdirected the jury in leaving any question of privilege to them. It is true that a writer in a public newspaper is privileged to comment fairly and bonâ fide on a matter of public interest and importance. But comments on the conduct of private persons attending a meeting in a private capacity cannot be brought within such a privilege.

[BRETT, J. Is not the conduct of persons attending a public election meeting a matter of public interest?]

In *Davidson* v. *Duncan* (1), it was held that the privilege did not

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(1) 7 E. & B. 229; 26 L. J. (Q.B.) 104. 3 Jur. N.S. 614

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extend to the report of what was said at a public meeting. The case of *Wason* v. *Walter* (1), in which this question was much considered, related to the report of proceedings in Parliament, and the matter was obviously one of the greatest public concern. That can hardly be considered analogous to the present case. The case of *Henwood* v. *Harrison* (2) goes as far as any decision on this subject has yet done. But there the libel was the publication of a parliamentary minute relating to a subject of national importance.

BRETT, J. I am of opinion that there should be no rule. The contention on the plaintiff's behalf is, that the Chief Justice misdirected the jury in leaving it to them to say whether the article in question was a fair bonâ fide discussion of the conduct of the plaintiff in respect of a matter of public interest. It was argued that the conduct of persons attending, as the plaintiff did, a public meeting held for the purpose of promoting the election of a candidate to a seat in Parliament, was not a matter in respect of which a question of privilege could be raised. It was not, as it seemed to me, contended that a public election meeting was not a matter of public interest, but that, if persons went there for private reasons, not originally intending to take part in the proceedings, their conduct could not be discussed. I am clearly of opinion that a meeting assembled to hear a candidate at a parliamentary election discuss subjects of general importance is a meeting of public interest, and that the conduct at such meeting of persons who take part in it may be made the subject of fair bonâ fide discussion by a writer in a public newspaper. I do not think the conduct of such persons is exempt from such discussion because they do not go there in any public capacity, and it seems to me, therefore, that it was a proper direction to give to the jury, that if the publication did not exceed the bounds of fair discussion, it was within the doctrine of privilege; or, in other words, was not a libel.

DENMAN, J. I entertained some doubt at first as to the question of privilege. As the jury did not specifically answer the questions put to them, and did not therefore find whether the alleged libel was a libel or not, or whether it was true or not, if we thought that the second question ought not to have been left to them, we should be obliged to grant a rule. On the whole, I have come to the conclusion, that if the words complained of were a fair comment on the conduct of a person at an election meeting, they were privileged. There appears to be no express authority on the point. The case of *Davidson* v. *Duncan* (1) seems at first sight rather against the proposition. That case was, however, much discussed in the case of *Wason* v. *Walter* (2), and it seems doubtful how far the principle upon which it was decided can now be adopted without qualification. The case of *Kelly* v. *Tinling* (3) appears to be a strong authority pointing in the opposite direction. It was there held that a churchwarden, having written to the plaintiff, the incumbent, accusing him of having desecrated the church by allowing books to be sold in it during service, and by turning the vestry room into a cooking apartment, and the defendant having published the correspondence in his newspaper with comments on the plaintiff's conduct, the matter was one of public interest, which might be made the subject of fair public discussion. I agree that there should be no rule.

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(1) Law Rep. 4 Q. B. 73.

(2) Law Rep. 7 C. P. 606.

LORD COLERIDGE, C.J., concurred.

Rule refused.

Attorneys for plaintiff: *Gover & Norton.*

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(1) 7 E. & B. 229; 26 L. J. (Q.B.) 104. 3 Jur NS 614

(2) Law Rep. 4 Q. B. 73.

(3) Law Rep. 1 Q. B. 699.

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April 25.

Q 208 & 23
0 Ch 605
Ch D. 716
Ch D 546
47, 550
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QBD 305

BENJAMIN *v.* STORR AND ANOTHER.

Nuisance in a Public Highway—Private and particular Damage to an Individual—Evidence.

To entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must shew that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial.

The plaintiff kept a coffee-house in a narrow street near Covent Garden. The defendants carried on an extensive business as auctioneers in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from vans. The vans intercepted the light from the plaintiff's coffee-shop to such an extent that he was obliged to burn gas nearly all day, and access to the shop was obstructed by the horses standing in front of the door, and the stench arising from their frequent staleing there rendered the plaintiff's dwelling incommodious and uncomfortable:—

Held, that the evidence disclosed such a direct and substantial private and particular damage to the plaintiff beyond that suffered by the rest of the public, as to entitle him to maintain an action.

The declaration alleged that, in consequence of the nuisance complained of, the plaintiff's premises had been rendered "unhealthy and incommodious" as well as a house of business as also as a dwelling-house:—

Held, that evidence that the premises were rendered uncomfortable by reason of the offensive smells arising from the staleing of the horses which were kept constantly standing opposite to them, was properly admitted.

THE declaration stated that, before and at the time of the happening of the grievances thereinafter mentioned, there was, and still of right ought to be, a certain public highway known as and called Rose Street, and the plaintiff, before &c., was possessed of a certain coffee-house and premises abutting on and opening into the said highway, and carried on in the said coffee-house the business and trade of a coffee-house keeper; yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his said trade as a coffee-house keeper, from time to time kept and continued to keep divers and an unnecessary number of carts, vans, waggons, and horses standing in the said highway for an unreasonable and unnecessary length of time, and in such a position as unreasonably and unnecessarily to obstruct the said highway, and the light and air entering through the windows and doors of the said coffee-house of the

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plaintiff, and the access to the said coffee-house; whereby the plaintiff was and is prevented from carrying on his said trade in so large, ample, and beneficial a manner as he otherwise might and would have done, and lost and had been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to him from carrying on his said trade and business of a coffee-house keeper; and whereby also the said coffee-house and premises had been rendered unhealthy and incommodious as well as a house of business as also as a dwelling-house. Claim, 500*l.*, and an injunction to restrain the defendants from a continuance and repetition of the injuries complained of and the committal of other injuries of a like kind.

Plea, not guilty. Issue thereon.

The cause was tried before Honyman, J., at the sittings for Middlesex in Trinity Term last. The facts were as follows:—The plaintiff was a coffee-house keeper in Rose Street, Covent Garden. The defendants were auctioneers having sale-rooms in King Street, with a back or warehouse entrance in Rose Street, close adjoining the plaintiff's premises. The plaintiff had occupied his premises since March, 1870. The defendants and their predecessors had carried on their business since 1830, but of late years much more extensively than formerly. The carriage-way of Rose Street was only about eight feet wide; and when the defendants' vans were there loading or unloading (which was usually from 8.30 a.m. to 7 or 8 p.m. daily), not only was the access to the plaintiff's coffee-house obstructed so as to deter customers from coming there, but the light was diminished to such an extent as to make it necessary to burn gas nearly all day, and the smell arising from the staleing of the horses was excessively offensive; and the consequence of all these accumulated evils was that the takings of the plaintiff's coffee-house were materially lessened.

Evidence was tendered to shew that the plaintiff's premises were rendered uncomfortable by the offensive smells arising from the staleing of the horses which were kept constantly standing opposite to the plaintiff's door. This evidence was objected to, as having reference to a damage not specifically alleged in the declaration. The learned judge, however, received it.

On the part of the defendants it was proved that the waggons and horses were not kept standing in the street longer than the exigencies of their business required; and it was submitted that in order to maintain the action, the plaintiff must shew, not only that the thing complained of was a public nuisance (in which case the remedy would be by indictment), but that he had sustained a private and particular injury beyond that suffered by the rest of the public: *Ricket* v. *Metropolitan Ry. Co.* (1)

4 Ch D 552

The learned judge left it to the jury to say whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience; telling them that they were not to consider solely what was convenient for the business of the defendants.

The jury returned a verdict for the plaintiff, damages 75*l.*; and the learned judge reserved leave to the defendants to move "on the question of the damage being enough to support the action."

Torr, Q.C., in Trinity Term, 1873, obtained a rule nisi to enter a nonsuit, on the ground that the plaintiff did not give sufficient evidence of damage to himself to maintain the action; or for a new trial, on the grounds that improper evidence was admitted against the defendants at the trial and that the verdict was against the weight of evidence.

Rowland V. Williams (with him *Huddleston, Q.C.*), shewed cause. The declaration substantially discloses two causes of complaint,—1. That the defendants kept so large a number of horses and waggons standing in the street near the plaintiff's premises, and for such an unreasonable time, as to cause a nuisance,—2. That the waggons and horses obstructed the highway and occasioned damage to the plaintiff's business by preventing free access thereto, and obstructed the light and air. There is nothing in any of the recent cases to alter or affect the old law, that, if a person by an unnecessary and unreasonable user of a highway causes damage to another beyond and distinct from the general injury to the rest of the public, a cause of action arises: *Wilkes* v. *Hungerford Market Co.* (2); *Rose* v. *Groves* (3); *Simmons* v. *Lilly-*

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(1) Law Rep. 2 H. L. 175.

(2) 2 Bing. N. C. 281.

(3) 5 M. & G. 613.

stone. (1) The first-mentioned case has been the subject of some remark, and may now be considered to be overruled as to one point, which does not affect the present case, but as to that only: see *Ricket* v. *Metropolitan Ry. Co.* (2); see also the observations of Willes, J., in *Beckett* v. *Midland Ry. Co.* (3) In the last-mentioned case the thing complained of was the narrowing the highway opposite the plaintiff's premises, and thereby obstructing the free access thereto; and this was held to be such a private and particular damage as would have given the plaintiff a cause of action before the passing of the Lands Clauses Consolidation Act. *M'Carthy* v. *Metropolitan Board of Works* (4) is a case of the same class. Here, there was abundant evidence of the obstruction of light and air. The plaintiff was compelled to burn gas all the time the waggons were there, and that was nearly all day. The distinction between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible discomfort, is well pointed out by Lord Westbury in *St. Helen's Smelting Co.* v. *Tipping.* (5) There is no ground for the complaint of the improper admission of evidence. The declaration alleges that the plaintiff's dwelling was rendered unhealthy and incommodious, and that is sufficient to let in the evidence as to offensive smells.

Torr, Q.C., and *J. F. Torr*, in support of the rule. Where the cause of action is compounded of a public nuisance and an alleged private and particular injury, the recent cases all shew that there must be some palpable pecuniary damage resulting to the individual from the public nuisance, not merely an inconvenience to or a loss of trade, such as being compelled to carry goods by a circuitous and inconvenient way: *Hubert* v. *Groves.* (6) The judgment of Erle, C.J., in the Exchequer Chamber, in *Ricket* v. *Metropolitan Ry. Co.* (7), contains an excellent summary of the earlier authorities. "An action lies," he says, "where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed: but the following cases exemplify its application. In *Iveson* v. *Moore* (1), the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay. In this case the law on actions for obstructions of highways is well discussed. In *Maynell* v. *Saltmarsh* (2) the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart* v. *Basset* (3) the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home; and several grounds of special damage are suggested by Lord Holt in *Iveson* v. *Moore.* (1) In *Fineux* v. *Hovenden* (4) the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasley* v. *Codling* (5) the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine* v. *Patrick* (6) the plaintiff's damage was not actionable; and the example of actionable damage is put thus: 'A particular damage, to maintain the action, ought to be direct and not consequential, as, for instance, the loss of his horse, or by some corporeal hurt by falling into a trench on the highway.' In *Chichester* v. *Lethbridge* (7) the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose* v. *Miles* (8) the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the goods overland. In all these cases the plaintiff was exercising his right of way, and the defendant obstructed that exercise, and caused particular damage thereby directly and immediately to the plaintiff." To give a right of action, therefore, the plaintiff must have sustained a substantial injury other than that which is the natural result of the alleged nuisance to any one else: he must be damaged, not to a greater extent merely, but in a different manner. In *Winterbottom* v. *Lord Derby* (1), which was an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road or to remove the obstruction; and he was held not entitled to maintain the action. Kelly, C.B., in giving judgment, says (2): "It is impossible to look at the case of *Ricket* v. *Metropolitan Ry. Co.* (3), and at the observations in the judgments of the learned law lords on it (4), without seeing that they thought the law had been too far extended in the direction of allowing this description of action to be brought." In the *City of London Brewery Co.* v. *Tennant* (5), Lord Selborne, C., says: "I observe that a formula has crept into the pleadings in cases of this description, and, as the Lord Justice (Sir W. M. James) has said, has passed from the pleadings into the evidence, in which air is coupled with light. Now, the nature of the case which would have to be made for an injunction by reason of the obstruction of air is toto cœlo different from the case which has to be made for an injunction in respect of light. It is only in very rare and special cases, involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air. Therefore, when witnesses say that there is a material diminution of light and air, and say no more, they are in truth reducing the value of their evidence as to light to the standard which must be applied to their evidence as to air, as to which such evidence is of no value whatever." *Wilkes* v. *Hungerford Market Co.* (6) must now for all practical purposes be considered as overruled: see the observations of Erle, C.J., in *Ricket* v. *Metropolitan Ry. Co.* (7), and of Willes, J., in *Beckett* v. *Midland Ry. Co.* (8) There was no evidence here to warrant the jury in coming to the conclusion that there was more than a fair and reasonable user of the highway by the defendants. And, with regard to the evidence as to offensive smells, that clearly was not admissible under this declaration. A house cannot be said to be less *commodious* by reason of bad smells; and there was no suggestion that there was anything to render the plaintiff's premises unhealthy.

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(1) 8 Ex. 431; 22 L. J. (Ex.) 217.

(2) Law Rep. 2 H. L. 175, 188.

(3) Law Rep. 3 C. P. 97—101.

(4) Law Rep. 7 C. P. 508; in error, 8 C. P. 191.

(5) 11 H. L. C. 642, 650; 35 L. J. (Q.B.) 66. 11 Jur. N.S. 785

(6) 1 Esp. 148.

(7) 5 B. & S. 156; 34 L. J. (Q.B.) 257, 259. 11 Jur. N.S. 280

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(1) 1 Ld. Raym. 486.

(2) 1 Keb. 847.

(3) T. Jones, 156.

(4) Cro. Eliz. 664.

(5) 2 Bing. 263.

(6) Carth. 191, 194.

(7) Willes, 71.

(8) 4 M. & S. 101.

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(1) Law Rep. 2 Ex. 316.

(2) Law Rep. 2 Ex. at p. 321.

(3) 5 B. & S. 156; 34 L. J. (Q.B.) 257. 11 Jur. N.S. 260

(4) Law Rep. 2 H. L. 175.

(5) Law Rep. 9 Ch. 212, 220.

(6) 2 Bing. N. C. 281.

(7) 5 B. & S. at p. 161. 11 Jur. NS 260-1

(8) Law Rep. 3 C. P. 82.

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BRETT, J. This action is founded upon alleged wrongful acts by the defendants, viz. the unreasonable use of a highway,—unreasonable to such an extent as to amount to a nuisance. That alone would not give the plaintiff a right of action; but the plaintiff goes on to allege in his declaration that the nuisance complained of is of such a kind as to cause him a particular injury other than and beyond that suffered by the rest of the public, and therefore he claims damages against the defendants. The first point discussed was whether it was necessary that the plaintiff should shew something more than an injury to his business, an actual injury to his property; and cases decided under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) were cited. In this case I think the action is maintainable without shewing injury to property. In the class of cases referred to, the action is brought to recover compensation for lands taken or injuriously affected; and there, of course, injury to property must be shewn, and not merely injury to the trade of the occupier. Those cases, therefore, do not at all affect the present. Before the passing of the Lands Clauses Consolidation Act, by the common law of England, a person guilty of a public nuisance might be indicted; but, if injury resulted to a private individual, other and greater than that which was common to all the Queen's subjects, the person injured had his remedy by action. The cases referred to upon this subject shew that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must shew a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to shew that he suffers the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway. The case of *Hubert* v. *Groves* (1) seems to me to prove that proposition.

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(1) 1 Esp. 148.

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There, the plaintiff's business was injured by the obstruction of a highway, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie. *Winterbottom* v. *Lord Derby* (1) was decided upon the same ground; the plaintiff failed because he was unable to shew that he had sustained any injury other and different from that which was common to all the rest of the public. Other cases shew that the injury to the individual must be direct, and not a mere consequential injury; as, where one way is obstructed, but another (though possibly a less convenient one) is left open; in such a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shewn to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial. The question then is, whether the plaintiff here has brought himself within the rule so laid down.

The evidence on the part of the plaintiff shewed that from the too long standing of horses and waggons of the defendants in the highway opposite his house, the free passage of light and air to his premises was obstructed, and the plaintiff was in consequence obliged to burn gas nearly all day, and so to incur expense. I think that brings the case within all the requirements I have pointed out; it was a particular, a direct, and a substantial damage. As to the bad smell, that also was a particular injury to the plaintiff, and a direct and substantial one. So, if by reason of the access to his premises being obstructed for an unreasonable time and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage. As to that part of the rule which seeks to enter a nonsuit, assuming the evidence objected to to have been properly received, I think it cannot be sustained.

As to the alleged misreception of evidence, I must confess I have felt some doubt. It is said that there is nothing about bad smells

(1) Law Rep. 2 Ex. 316.

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in the declaration; and my Brother Honyman seems to have thought that this part of the cause of complaint was not fairly brought to the notice of the defendants in the declaration. That being so, no amendment would now be allowed. The question, then, is, whether evidence of that sort was admissible under the declaration as it stands. The allegation of the grievance in the declaration is, that the defendants kept and continued to keep divers and an unnecessary number of carts, vans, waggons, and horses standing in the highway for an unnecessary length of time and in such a position as unreasonably and unnecessarily to obstruct the highway, and the light and air entering through the windows and doors of the plaintiff's coffee-house, and the access to the said coffee-house. That is a somewhat informal way of stating it. The proper way would have been, and thereby the light and air were obstructed and prevented from entering, &c. And then it goes on, "whereby the plaintiff was and is prevented from carrying on his trade in so large and beneficial a manner as he otherwise might and would have done, and lost divers profits, &c., and whereby also the premises were rendered unhealthy and incommodious, as well as a house of business as also as a dwelling-house." That is a distinct allegation of a particular injury to the plaintiff in his business. I doubted at first whether the inconvenience arising from bad smells could properly have been given in evidence under the averment that the premises had been rendered unhealthy and incommodious. But, putting a reasonable construction upon this declaration, I have come to the conclusion that the evidence upon that head was properly received, and that there should be no rule on the ground of the improper reception of evidence. With regard to that part of the rule which seeks to have a new trial on the ground that the verdict was against the weight of evidence, I must confess I should have looked very suspiciously at the evidence offered on the part of the plaintiff in such a case. But I cannot say that there was not some evidence which the jury were entitled to take into their consideration; the expenditure of gas in consequence of the obstruction of light, for instance; and we are not to overrule the conclusion they have come to unless we can say that it is so manifestly unreasonable that it ought not to be allowed to stand. I therefore think the rule should be discharged.

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DENMAN, J. I am of the same opinion. Upon the first point, I am of opinion that the evidence disclosed such a particular damage to the plaintiff beyond that sustained by the rest of the public as to entitle him to maintain the action. I also think the damage to the plaintiff was the direct and immediate consequence of the defendant's wrongful acts. I think it is quite clear that, if the acts of the defendants had the effect of causing the plaintiff a daily expenditure of gas to give him the amount of light which but for the nuisance he would have had without it, that separates the plaintiff from the rest of the public and gives him a right of action. In the next place, I think the verdict was such as the jury were fully justified in finding. The damage shewn was clearly appreciable. As to the alleged improper reception of evidence, I must confess I have felt some doubt whether the evidence as to bad smells arising from the constant staleing of the horses before the plaintiff's house was admissible under this declaration; but upon consideration I cannot help thinking that that part of the declaration which states that the coffee-house and premises of the plaintiff were by means of the premises rendered unhealthy and incommodious, is sufficient to entitle the jury to say that there was damage to the plaintiff caused by the detention of horses for an unreasonable time in a narrow street, and a substantial interference with the comfortable use and enjoyment of the plaintiff's house. I think the case was properly left to the jury; and I think the Court ought never to interfere with the verdict of a jury,—which is generally a more competent tribunal to deal with such matters as this than the Court can be,—unless satisfied that it is manifestly wrong. I certainly see no ground for saying so in this case.

Rule discharged.

Attorney for plaintiff: *C. H. Lind.*

Attorneys for defendants: *Stileman & Neate.*

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May 7.

EDL

WAKEFIELD AND OTHERS *v.* BROWN.

Taxation of Costs—Master's Discretion—Counsel's Fees.

The Court will rarely interfere to review a taxation upon a matter of discretion only.

The master having allowed additional fees to counsel upon additional papers laid before them as requested on a consultation, a judge at chambers, adopting a suggestion that the additional brief contained no "new matter," but merely a statement in a new form of that which had already appeared in the original brief, and treating the question as one of principle and not of mere discretion, made an order for a review.

The Court rescinded his order.

THIS was an action upon a promissory note, by payees against maker.

The defendant, amongst other pleas, pleaded an equitable plea of set-off for work and labour, &c., in managing and superintending the employment and discharge of several steam-tugs belonging to the plaintiffs.

The cause being down for trial, briefs were delivered to counsel, consisting of about fifty-seven sheets, a fee of 10 guineas being indorsed on the brief of the leading counsel, and 7 guineas on that of the junior. Upon consultation the senior counsel required to be furnished with "a further statement in a tabulated form shewing the manner in which the defendant's set-off was answered with reference to the various ships." This statement was accordingly furnished to both counsel. It consisted of four brief sheets, indorsed with a fee of 3 guineas to the senior and 2 guineas to the junior.

A verdict having passed for the plaintiffs, it was objected upon the taxation of costs that these two last-mentioned fees ought not to be allowed, inasmuch as such further statement would have been unnecessary if the brief had been properly drawn in the first instance. The master, however, allowed them.

Upon a summons at Chambers to review, it was urged before Cockburn, C.J., that the additional fees ought not to have been allowed, "there being no new matter laid before counsel, but merely a tabulated statement." His Lordship yielding to this argument directed a review.

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Field, Q.C., obtained a rule nisi to rescind or vary that order upon an affidavit that it was usual, where additional information is required by counsel, to indorse the additional brief with a further fee.

R. E. Webster shewed cause. No doubt, the Court will be slow to interfere with the discretion of the master in regard to the allowance of fees to counsel. But it is also an inflexible rule that, where a learned judge has exercised his discretion upon a summons at chambers, the Court will not interfere unless they see that the judge has gone decidedly wrong.

[BRETT, J. The Court never interferes with the master's discretion in matters which are peculiarly within his province, unless it be satisfied that he has been clearly wrong, or unless some principle of taxtion is involved.

DENMAN, J., referred to *Lockstone* v. *London, Brighton, and South Coast Ry. Co.* (1), where it is said that the allowance of fees is in the "almost uncontrolled" discretion of the master.]

A very strong case was made before the Lord Chief Justice at chambers; and, unless the Court is prepared to say that he was clearly mistaken in the view he took, his order must stand.

[LORD COLERIDGE, C.J. I think we should look at this matter as if it had been an original application to us, and not an appeal from chambers.]

Field, Q.C., in support of the rule. The cases of *Lockstone* v. *London, Brighton, and South Coast Ry. Co.* (1) and *Hill* v. *Peel* (2) are distinct authorities to shew that the amount of fees, as well as the number of witnesses to be allowed, is always left to the master. In the last-mentioned case, Bovill, C.J., delivering the judgment of the Court, said (3): "A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case: and where, after properly considering the matter, the master has arrived at a decision, it lies upon those who impeach his decision to satisfy the Court that he is wrong. Where a principle is involved, the Court will always entertain the question, and if necessary give directions to the master: but, where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to shew that the officer is wrong in the judgment which he has formed." That lays down the rule which has always guided the Courts in these matters, viz. that they will never interfere with the taxation unless the master is wrong in principle or very clearly wrong in detail. It is not for the judge at chambers, or even for the Court, to usurp the functions of the master. The Chief Justice acted upon the notion that, because no "new matter" appeared in the additional briefs, therefore the additional fees were not justifiable. But here there was an extensive and complex plea of set-off. The additional matter,—that is, the re-arrangement of the old matter in a more convenient form,—was suggested for the bonâ fide purpose of enabling counsel at the trial more clearly to lay the case before the jury, so as to avoid the expense and inconvenience of a reference.

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(1) 12 C. B. (N.S.) 243.
(2) Law Rep. 5 C. P. 172.
(3) Law Rep. 5 C. P. at p. ~~1~~80.

[LORD COLERIDGE, C.J. It is often most convenient to have the matter arranged in a tabulated form.]

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. The matter comes before us in this way. A verdict had been found for the plaintiff, and, upon the taxation of costs, two items were objected to, viz. the fees allowed to the counsel with additional papers laid before them containing "a statement in a tabulated form shewing the manner in which the defendant's set-off was answered with reference to the various ships," which counsel had on consultation thought it expedient that they should be furnished with, in order that they might have the matter more clearly and distinctly before their minds, and thus in all probability avoid the necessity of a reference to an arbitrator to look into the accounts. These items having been allowed by the master, a summons was taken out to review the taxation; and, upon the summons coming on before Cockburn, C.J., it was again urged that the additional fees ought not to be allowed, inasmuch as no "new matter" was laid before counsel. His lordship, yielding to the objection, made an order for a review of the taxation. There are many cases, as I have already intimated, where a tabulated statement of the contents of a brief properly drawn, may be reasonably required for the conduct of the cause at nisi prius, and may properly be charged for. In the present case, it would seem that the tabulated statement was rendered necessary by the complex nature of the defendant's set-off. The affidavit represents the Lord Chief Justice to have said that "he thought the further fees to counsel ought not to be allowed in a case of this nature, there being, so far as appeared, no new matter requiring the same." He appears, therefore, to have rested his decision upon the fact that the additional statement contained no new matter, but was merely a more compendious statement of matters contained in the brief as originally delivered. With sincere respect for everything that falls from that learned judge, I am aware of no authority in support of that view; and reason appears to me opposed to it. It is unnecessary to say what my opinion would have been if his Lordship had treated the question as one of discretion only.

BRETT, J. In directing a review in this case, the Lord Chief Justice overruled the decision of the master by laying down a principle which is to guide the taxing officers in all future cases, viz. that no additional fee shall be allowed on taxation to the successful party on a second brief delivered to counsel, where bonâ fide required by them and necessary, unless such additional brief contains "new matter," notwithstanding the original brief may have been drawn with all reasonable care, and notwithstanding the counsel may have required a portion of it to be re-cast in a new form. The question is whether the Court is prepared to adopt that rule. If not, then, according to the most confined view of the practice in such cases, the Court is bound to express its opinion. It appears to me that such an inflexible rule as that would be highly dangerous, and would in many cases lead to much larger expense as against the person appealing. With the greatest deference, therefore, I cannot agree with the rule so laid down. As to the question of the propriety of reviewing the master's discretion in the allowance of counsel's fees, I shall be prepared to deal with it whenever it may properly arise.

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DENMAN, J. I also think this rule should be made absolute. If I were satisfied that the Lord Chief Justice at chambers decided as he did by way of review of the discretion of the master, I should have felt that that raised a difficult question, upon which at present I pronounce no opinion. But I think it is plain his lordship did not intend to review the master's discretion, but that he disallowed the fees in question upon the principle stated in the affidavit, viz. that the additional brief contained no new matter. I agree with the rest of the Court that, however carefully a brief may be drawn, counsel may reasonably require further particulars or a tabulated statement of matters already detailed in the brief, in order to enable him more conveniently to conduct the case, or possibly to avoid a reference.

Rule absolute.

Attorneys for plaintiffs: *Scott, Jarmain, & Co., for H. Arnold, Kendal.*

Attorneys for defendant: *Hillyer, Fenwick, & Stibbard, for T. G. Gibson, Newcastle-upon-Tyne.*

May 8.

9 Q B 3.
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ROBINSON *v.* EMANUEL.

Lord Mayor's Court, London—Jurisdiction—Prohibition—Mayor's Court Procedure Act, 20 *&* 21 *Vict. c. clvii. ss.* 12, 15.

The circumstance of the debt or damages being under 50*l.* does not prevent this Court from issuing a prohibition to the Lord Mayor's Court, London, where the cause of action arose without its jurisdiction.

ACTION in the Lord Mayor's Court, London, upon a cheque for 10*l.* drawn on the 15th of September, 1873, by one Lazarus, upon the London and South Western Bank, 7, Fenchurch Street, London, payable to bearer, and indorsed and handed by the defendant to the plaintiff at Scarborough. The plaintiff resided at Scarborough and the defendant at Sutherland Gardens, Middlesex, and neither resided in the city nor did any part of the cause of action arise therein.

Upon an affidavit of these facts,

Kemp obtained a rule nisi for a prohibition.

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Willis shewed cause. Part of the cause of action, no doubt, arose in Scarborough; but the cheque was payable in London. The 12th section of the Mayor's Court Procedure Act, 20 & 21 Vict. c. clvii, gives the Mayor's Court jurisdiction in all cases where the debt or damages do not exceed 50*l.*, if any part of the cause of action arises within the city.

[LORD COLERIDGE, C.J. This Court decided the express point in Hilary Term last in *Quartly* v. *Timmins.* (1)]

It did not appear there that any part of the cause of action arose within the city of London. The 12th section was clearly intended to give jurisdiction to the Lord Mayor's Court in such a case as this.

[BRETT, J. If that had been the intention of the legislature, it was very easy to say so.]

Under the circumstances, the Court will not, it is hoped, make the rule absolute with costs.

Kemp, contrà, was not called upon.

LORD COLERIDGE, C.J. The rule must be made absolute, and I see no reason why it should not be made absolute with costs. This is a jurisdiction which is attempted to be usurped, not by the parties themselves, but by their attorneys. It may be that the client may have a remedy against his attorney for the costs he has improperly put him to, when he must know from the numerous decisions in all the Courts that the claim of jurisdiction could not be sustained; and especially as in *Quartly* v. *Timmins* (1) the Court did not call upon counsel to support his rule. It may be also that the Court will, if this improper course of proceeding is persisted in, exercise its power in another way to check the evil. (2)

BRETT, J. The Courts have upon so many occasions, by granting prohibitions, discouraged these attempts of practitioners in the city to extend the jurisdiction of the Lord Mayor's Court that it is impossible the plaintiff's attorney in this case could fairly have imagined that that Court had jurisdiction to try a cause of action arising at Scarborough. After the elaborate discussion this matter

(1) Post, p. 416.

(2) This was done in some subsequent cases by ordering the plaintiff's attorney personally to pay the costs. see post 751

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has undergone in the Court of ultimate appeal (1), it behoves the Court to stamp out these improper attempts to create a jurisdiction which was never contemplated by the legislature. The person who applies for the prohibition in this case has done no wrong in coming to the Court and informing it of this renewed attempt at usurping its jurisdiction. Why, then, should he be called upon to do this at his own expense? I think his costs should be paid by the plaintiff in the first instance. But I also agree with my Lord that the client would have a clear right to recover them back from his own attorney.

DENMAN, J. I think it would be reflecting upon the propriety of the decision in *Quartly* v. *Timmins*, which I have no desire to do, not to make this rule also absolute with costs.

Rule absolute with costs.

Attorney for plaintiff: *A. W. Sadgrove.*
Attorney for defendant: *Paul Emanuel.*

Jan. 20.

QUARTLY *v.* TIMMINS.

Lord Mayor's Court, London—Jurisdiction—Prohibition—Mayor's Court Procedure Act, 20 & 21 Vict. c. clvii, ss. 12, 15.

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1 CPD. 419
— 635,

The Court, at the instance of a stranger, made a rule absolute for a prohibition to the Lord Mayor's Court, London, after verdict for the plaintiff, notwithstanding that the claim was below 50*l.*, and consequently there could be no plea to the jurisdiction.

This action was commenced under the Bills of Exchange Act, 1867, (18 & 19 Vict. c. 67), in the Lord Mayor's Court, London, to recover 30*l.* 1*s.*, the balance alleged to be due from the defendant to the plaintiff for principal and interest on a bill of exchange drawn on the 5th of June, 1873, by one Pyne upon and accepted by the defendant, payable one month after date. After verdict for the plaintiff,

Foard, for the defendant, in Michaelmas Term last, obtained a rule nisi for a prohibition, on the ground that the Lord Mayor's Court had no jurisdiction, the cause of action not having arisen wholly or in a material part within the city of London, and the defendant not being amenable to the jurisdiction of that Court.

January 20, 1874. *Plumtree* shewed cause. The 15th section of the Mayor's Court Procedure Act, 1857, 20 & 21 Vict. c. clvii, enacts that "no defendant

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(1) In *Mayor, &c., of London* v. *Cox*, Law Rep. 2 H. L. 239.

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shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever, except by plea;" and s. 12 enacts that, "where the debt or damage claimed in any action shall not exceed the sum of 50*l.*, no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein." In *Manning* v. *Farquharson* (1), where the question of jurisdiction arose before Coleridge, J., the learned judge said: "The Act says that 'no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever, except by plea.' The defendant, therefore, may elect to plead to the jurisdiction or not: in either case, there is jurisdiction to go on and try the cause. If the defendant does not plead to the jurisdiction, then the verdict would be one way or the other, and decisive between the parties. If he does plead to the jurisdiction, then he has to support his plea by proof. In either case, the Court below is to go on and try the question. The Act seems in effect to be giving jurisdiction to try this matter. It was said that a stranger might apply for a prohibition: but, if he does so, he must shew that the Court below has no jurisdiction to try the cause as between the parties themselves. Whether this enactment has the effect of a pleading rule or not, I think, makes no difference, as it gives to the court a right to decide between the parties. The parties have a right to call on the court to proceed, and by its decision both must be bound. It is not made out to my satisfaction that the court had not jurisdiction."

[KEATING, J. That case occurred long before the decision of the House of Lords in *Mayor of London* v. *Cox.* (2) There have been numerous applications for prohibitions since by strangers: see *Cook* v. *Gill.* (3)]

Manning v. *Farquharson* (1) was cited in *Mayor of London* v. *Cox* (2) without disapprobation; and, when that case was in the Exchequer Chamber (4), Crompton, J., delivering the judgment of the Court, says: "We approve of the decision in *Manning* v. *Farquharson* (1), where it was held that the city court cannot be stopped by prohibition from trying the case as between the plaintiff and defendant in the court below, if the defendant chooses to have it tried there and does not plead the want of jurisdiction, according to the provisions of the statute." After a verdict against the defendant, this Court will not in the exercise of its discretion interfere at the instance of a stranger in a case where the party himself could not be heard to object to the jurisdiction.

Kemp was not called upon to support his rule.

PER CURIAM. (5) The rule must be absolute, with costs.

Rule absolute with costs.

Attorney for plaintiff: *George Charles.*
Attorney for defendant: *W. E. Goatly.*

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(1) 30 L. J. (Q.B.) 22. 6 Jur. N.S. 130
(2) Law Rep. 2 H. L. 239.
(3) Law Rep. 8 C. P. 107.
(4) 2 H. & C. 401, 409. 9 Jur. N.S. 800, 802
(5) Lord Coleridge, C.J., and Keating and Brett, JJ.

1874 May 8.

TAPP *v.* JONES.

Lord Mayor's Court, London—Attachment—Prohibition—Judgment of the Court of Q. B.

A judgment was obtained by the plaintiff against the defendant in China. In an action upon that judgment in the Queen's Bench here, judgment was, pursuant to a consent given by the defendant's attorneys in the city of London, signed at the Queen's Bench Office, Temple:—

Held, that the judgment so signed was not a debt arising within the city of London, so as to give jurisdiction to the Lord Mayor's Court to attach moneys of the defendants in the hands of his attorneys there.

The plaintiff recovered a judgment against the defendant in the Supreme Court of China and Japan for money lent whilst both were residing at Shanghae. An action was brought upon that judgment in the Court of Queen's Bench here, and judgment was signed therein by default on the 21st of November, 1872. Proceedings were then taken in the Lord Mayor's Court, London, and an attachment issued to attach certain moneys of the defendant in the hands of Messrs. Parson & Lee, who carry on business in the city of London, and who had acted as the attorneys for the defendant. Upon an affidavit of these facts, and stating that the cause of action did not nor did any part thereof accrue in the city of London, and that the defendant did not reside within the jurisdiction of the Lord Mayor's Court,

Kemp obtained a rule nisi for a prohibition.

Anderson shewed cause upon an affidavit stating amongst other things that the judgment upon which the proceedings were founded was signed upon a consent given by the garnishees, as attorneys for the defendant, at their office in Abchurch Lane, in the city of London. The judgment was signed at the Queen's Bench office in the Temple, which is within the city of London.

[Lord Coleridge, C.J. The cause of action here is not the judgment obtained here, but the debt contracted in China.]

To ground the attachment, an action is formally brought on the judgment of the Queen's Bench, in the Lord Mayor's Court; and the question is whether that does not arise within the city of London.

The signing of the judgment is the entry of the incipitur in the master's book: *Fisher* v. *Dudding*. (1)

[BRETT, J. The master's book is no evidence of the judgment. (2) If the authority of the Court is necessary to give validity to the judgment, that emanates from Westminster.]

If an action is brought upon a judgment of a superior Court, the venue must be laid in Middlesex, because the record is deposited in Middlesex: 2 Tidd, 9th ed. p. 1122; Bullen & Leake, 3rd ed. p. 193. But for this purpose no record is wanted. Sect. 206 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), enacts that "it shall not be necessary before issuing execution upon any judgment under the authority of this Act to enter the proceedings upon any roll, but an incipitur thereof may be made upon paper, shortly describing the nature of the judgment, according to the practice heretofore used, and judgment may thereupon be signed and costs taxed and execution issued according to the practice heretofore used; provided, nevertheless, that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence, or of bringing error, or the like."

[DENMAN, J. You cannot shew a complete cause of action on the judgment without shewing that a material part of it arose in Middlesex. The judgment is the judgment of the Court at Westminster.]

Kemp was not called upon to support the rule.

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. A judgment was recovered by the plaintiff against the defendant in China, and an action brought upon that judgment in the Court of Queen's Bench here, in which action judgment was signed by default; and because that judgment was signed at the office in the Temple, which is within the city of London, it is contended that there is a cause of action arising in the city of London so as to give the Lord Mayor's Court jurisdiction. It would be strange indeed if all Queen's Bench judgments could be sued on in the inferior court when those of the Exchequer certainly, and those of the Common Pleas possibly, by reason of the local position of their several offices, could not. There is no pretence for such an argument. The writ is tested before the Queen herself; all that is done in Court is before the Court at Westminster. Upon that short ground, viz. that, in point of law, all the proceedings take place at Westminster, I am of opinion that the rule for a prohibition should be made absolute. We were referred to s. 206 of the Common Law Procedure Act, 1852; but that is equally fatal to Mr. Anderson's argument. He was obliged to admit that the concluding words of that section, "or the like," include bringing an action. Before the plaintiff could have a complete cause of action upon the judgment, it would be necessary to make up the roll, and that takes place at Westminster. The most important part of the cause of action, therefore, arises in Middlesex, and not in London.

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(1) 9 Dowl. 872.

(2) See *Godefroy* v. *Jay*, 1 M. & P. 236; *Godefroy* v. *Dalton*, 6 Bing. 460.

BRETT and DENMAN, JJ., concurred.

Rule absolute, with costs.

Attorney for plaintiff: *Andrew Johnston.*
Attorneys for defendant: *Parson & Lee.*

May 8.

SEWELL *v.* CHEETHAM.

Lord Mayor's Court, London—What admitted under a Plea to the Jurisdiction.

A plea to the jurisdiction in an action by concessit solvere in the Lord Mayor's Court, London, by the indorsee against the acceptor of a bill of exchange made payable at a banker's in London (but not specially), admits the drawing, acceptance, indorsement, and dishonor of the bill, but not that either of them took place within the city of London.

CONCESSIT solvere in the Lord Mayor's Court, London, to which the defendant pleaded a plea to the jurisdiction. The action was brought by the plaintiff as indorsee against the defendant as acceptor of a bill of exchange. At the trial the bill, which was put in, appeared to have been drawn at Stockport and accepted "payable at Smith, Payne, & Smiths', London." The only evidence beyond the production of the bill itself was that of a witness who stated that he knew Smith, Payne, & Smiths, and that they were bankers in the city of London. There was no evidence of the drawing, acceptance, or indorsement of the bill.

A verdict having been taken for the plaintiff, subject to leave to the defendant to move to enter a nonsuit,

Glyn, on a former day, obtained a rule nisi accordingly, on the grounds,—1. that there was no evidence at the trial to support the plaintiff's claim,—2. that there was no evidence that the cause of action arose within the jurisdiction of the Lord Mayor's Court.

Kemp shewed cause. In an action against the acceptor of a bill of exchange, a plea denying the acceptance merely admits presentment and dishonour. So here, there being only a plea to the jurisdiction, the drawing, acceptance, indorsement, and dishonor of the bill were all admitted.

[LORD COLERIDGE, C.J. A plea to the jurisdiction denies everything that is necessary to give the Court jurisdiction. It was incumbent on the plaintiff to shew that some part of the cause of action arose within the city. Merely putting in the bill proves nothing.]

It was proved that Smith, Payne, and Smiths, at whose house the bill was made payable, were bankers carrying on their business in the city of London. The plea clearly admits that it was dishonored there.

[BRETT, J. The bill might have been presented to the defendant at Brighton.]

Glyn was not called upon to support the rule.

LORD COLERIDGE, C.J. The rule must be made absolute. It may be that a plea to the jurisdiction admits under these circumstances the drawing, acceptance, presentment, and dishonor of the bill somewhere. Mr. Kemp admits that he did not prove that any of these took place within the city. The only evidence tendered was the bill itself, which appeared to have been accepted "payable at Smith, Payne, & Smiths', London," and a witness who stated that he knew Smith, Payne, & Smiths, who carry on the business of bankers in London. The plea clearly does not admit that the presentment and dishonor took place at Smith, Payne, & Smiths', London, because there is nothing to confine the payment to that place, and the acceptor may be called on to pay the bill anywhere. There is no evidence, therefore, that any part of the cause of action arose within the jurisdiction of the Lord Mayor's Court.

BRETT, J. Mr. Glyn by a judicious silence prevented the plaintiff's counsel from going quite so far as he might have done. I quite agree that the plea admits a presentment and dishonor somewhere: but that falls short of what the plaintiff was bound to prove. The bill professes to be drawn at Stockport, and to have been accepted by the defendant payable at Smith, Payne, & Smiths', in London. It was necessary for the plaintiff to shew that some part of the cause of action arose in London. Presentation might be made anywhere. It is obvious that the mere production of the bill did not prove presentment at Smith, Payne, & Smiths' in London; for, where evidence is equally consistent with two things, it is no evidence of either of them. There was no evidence upon which it can be suggested that the plaintiff made out even a primâ facie case.

DENMAN, J., concurred.

Rule absolute.

Attorneys for plaintiff: *De Jersey & Micklem.*
Attorneys for defendant: *Pritchard, Englefield, & Co.*

FRANCIS *v.* DOWDESWELL AND OTHERS.

1874
May 8.

County Court—Notice of Appeal—Time for Execution of Bond—13 & 14 *Vict. c.* 61, *s.* 14.

A plaint was heard in a county court on the 13th of June, but no judgment was pronounced until the 11th of July, when the judge gave his reasons at great length. After several abortive attempts to obtain a copy of the judgment, the attorney for the unsuccessful party on the 20th of July sent a notice of appeal with the names of sureties, and asked for an appointment for the appellants and the sureties to attend to execute a bond. The registrar appointed Thursday, the 24th of July, at 4 p.m. The appellants and one surety attended, but the other surety did not attend, neither was the attorney there with the bond. On the 26th the appellants' attorney sent a bond to the office, with an intimation that the parties would attend to execute it on Monday, the 28th. They did so attend: but, the registrar being absent, a clerk in the office directed them to attend again on the 30th, when the registrar would be there. They all accordingly attended on the 30th, and the bond was executed:—

Held, that,—assuming that the 24th of July would under the circumstances have been in time,—the execution of the bond on the 30th was not a compliance with s. 14 of 13 & 14 Vict. c. 61; and the Court ordered the case to be struck out.

The Court in a subsequent term refused to re-open the matter, upon affidavits shewing that the registrar,—upon whose affidavit the Court had mainly relied,—had made a mistake, and that in truth all the parties had attended to execute the bond on the day which had been assumed to be the proper day.

APPEAL from the county court of Bedfordshire.

The cause was tried on the 13th of June, 1873, when the judge took time to consider, promising to send his written judgment to the registrar if possible before the next court, and, if not, to deliver it at the next court; and at the same time stating that it would not be necessary for the attorneys on either side to attend the court to hear the judgment, as they should be supplied with a copy of it by the registrar.

On the 11th of July the judgment (in favour of the plaintiff) was delivered, and the judge directed that the attorneys on each side should be furnished with a copy.

Some days afterwards, one of the defendants informed their attorney that he was present when the judgment was read, and that all he could learn from it was that it was against them, but that, inasmuch as the judge had directed that the registrar should furnish the attorney with a copy of it, he did not consider it necessary to communicate with him (the attorney) on the subject.

Not having heard from the registrar, the attorney on the 14th of July wrote to him as follows:—"What was the decision of the judge in this case on Friday last? I ought to know at once; as, if against me, I expect I shall have to appeal." To this the following reply was sent on the 15th:—"Your own clients should have informed you of the decision of the judge in this case. It was a verdict for the plaintiff, damages 5*l.* and costs, to be reduced to ¼*d.* and no costs, provided the defendants remove the obstruction to the plaintiff's right of way within fourteen days."

On the 16th of July the defendants' attorney wrote to the registrar,—"Please send me by return of post copy of judge's judgment in this case, as I intend to appeal against it, and I have not a day to spare:" and again on the 18th he wrote,—"I am much disappointed at not having received copy judgment this morning, as Monday [which would be the 21st of July] is the last day for notice of appeal. Pray send it by first train to-morrow."

On the 18th, the registrar sent the defendants' attorney a draft of the order, inclosed in the following letter:—"Herewith I send you a draft of the order, as it will be made out when the costs are taxed. The judge has stated his reasons for giving the judgment, upon several sheets of paper, which do not appear in the minute-book." On the 19th, the registrar again wrote,—"I have done for you all you can expect from me. You now have the judgment in draft. The judge read a long statement of his grounds, written on eight sheets of paper. Your clients were at the court and heard them. I presume your ground of appeal is on the question of title which the plaintiff claims to the 20-foot road."

On the 20th of July the defendants' attorney wrote to the registrar as follows:—"I did not ask for copy of the judgment as a favour, but as a matter of right, believing that I am entitled to it, and expecting to pay for it, and which I was quite ready to do. I am now, however, obliged to guess at its contents, and to do the best I can without it. I send notice of appeal and also notice of sureties. I presume you will fix the time for the attendance of the appellants and sureties to execute the bond, and give me and them the necessary notice for their attendance at the office for that purpose. I suppose, also, that under these circumstances, you will not tax the costs on Thursday, as arranged."

On the 21st of July, the registrar wrote to the defendants' attorney,—"I send you an appointment for executing the bond in the appeal herein, of which you will of course inform your clients. Having no instructions from the judge as to staying proceedings, I shall proceed to tax the costs at the time appointed." To this was appended a postscript,—"I presume you will prepare the bond according to form 98 in our County Court Practice." This letter also inclosed the following appointment,—"I appoint Thursday, the 24th day of July, 1873, at 4 o'clock in the afternoon, for execution of the bond to be given by the sureties in the matter of the appeal against the judgment in this action."

On the 24th of July the registrar wrote to the defendants' attorney,—"All your clients but Mr. Toby attended here to-day; but we could not complete the business, as you had not sent the bond; and neither the plaintiff nor his attorney has attended to signify his acceptance of your security. I have however taxed the costs, and to-morrow will send you the order upon the judgment."

On the 20th the attorney wrote to the registrar,—"I fully thought the bond was prepared by the registrar, or I would have prepared and sent it. I will do this out of hand, and send you. I cannot get on in preparing the case, unless I see the judge's judgment at length. Please copy and send it me as soon as possible, as the time for presenting case for signature cannot be far off. When is your next court?" And on the same day he again wrote,—"I send the bond for execution; and I believe the parties will all be there at your office on Monday to sign it. Pray let me have a copy of the judge's written judgment to-morrow if possible."

On the 26th, the defendants' attorney received the following from a clerk in the office of the county court,—"In the absence of Mr. Wright (the registrar), who has left home for a few days, I beg to acknowledge receipt of bond herein. I will copy judge's notes and decision, and forward them to you on Monday next. Our next court is on the 8th of August next." And on the 28th the defendants' attorney received a copy of the judge's decision.

On Monday, the 28th of July, the defendants and their sureties attended at the office of the registrar: but, in consequence of the registrar's absence, the bond could not then be executed, and they were directed to attend again on the 30th, when he would be returned. They did accordingly attend on that day, and the bond was duly executed by the defendants and their sureties, being the same parties as were named in the notice forwarded to the registrar on the 20th of July with the notice of appeal.

Graham obtained a rule nisi to strike out the appeal, on the ground that the appellants had not complied with the requirements of s. 14 of 13 & 14 Vict. c. 61 (1), and r. 191 of the County Court Rules, 1868. He cited *Stone* v. *Dean* (2), *Waterton* v. *Baker* (3), *Park Gate Iron Co.* v. *Coates* (4), and *Walters* v. *Coghlan.* (5)

Merewether shewed cause. In *Stone* v. *Dean* (2) it was held that compliance with the requirements of s. 14 of 13 & 14 Vict. c. 61, was a condition precedent to the appellant's right to appeal; but the more recent cases of *Waterton* v. *Baker* (3) and *Park Gate Iron Co.* v. *Coates* (4) do not sustain that view. These two cases, and *Walters* v. *Coghlan* (5), shew that it is enough if those requirements are substantially complied with. Here the appellants did all they could to place themselves in a position to have their appeal heard. The delay, if any, was the act of the registrar, for which they are not responsible. The real cause of the delay was the refusal of the registrar to furnish the appellants' attorney with a copy of the judgment, without which they could not comply with the requirement of the 188th rule of 1868.

Graham, in support of the rule. The proviso in s. 14 of 13 & 14 Vict. c. 61, is imperative. The notice of appeal must be given with the grounds of appeal, within ten days after judgment: see the rules of 1868, rules 188, 191. All should be done within the ten days. Even assuming that the registrar was warranted in appointing the 24th of July for the execution of the bond, the appellants were still in default. The bond was not executed until the 30th, which was clearly out of time.

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(1) For s. 14 see post, p. 427.

(2) E. B. & E. 504; 27 L. J. (Q.B.) 319. 4 Jur. N.S. 544.

(3) Law Rep. 3 Q. B. 173.

(4) Law Rep. 5 C. P. 634.

(5) Law Rep. 8 Q. B. 61.

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LORD COLERIDGE, C.J. I am of opinion that this rule must be made absolute. The matter arises on s. 14 of 13 & 14 Vict. c. 61, which enacts that, "if either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of common law at Westminster: provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be defendant and the appeal be dismissed: Provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the county court in which such action shall have been tried, and the same shall have been paid accordingly: and the said Court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper: and such orders shall be final." These are the words that we have to construe. Now, it is admitted that they do not make the giving of a notice within the ten days strictly a condition precedent: but they peremptorily enact what shall be done to entitle a party to appeal, and provide that, if certain requirements are not complied with, the appeal cannot be allowed. The facts are these: The cause was tried in the county court on the 13th of June, but judgment was not pronounced until the 11th of July. The decision being against the defendants, they were desirous of appealing, and their attorney (who was not present when the judgment was pronounced) made repeated applications to the registrar for the judgment and the reasons. On the 15th of July he got a statement of what the judgment was, but not the reasons. On the 16th and 18th he wrote again urging the registrar to send him a copy of the judgment. To this the registrar replied

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on the same and the following day by sending the attorney "a draft of the order as it will be made out when the costs are taxed," adding "The judge has stated his reasons for giving the judgment, upon several sheets of paper, which do not appear in the minute-book;" and further, "I have done for you all you can expect from me. You now have the judgment in draft. The judge read a long statement of his grounds, written on eight sheets of paper. Your clients were at the court and heard them." On the 20th the defendants' attorney sent a notice of appeal, with the names of sureties, and asked for an appointment for the attendance of the appellants and the sureties to execute the bond. The registrar appointed Thursday, the 24th of July. On that day,—which I will assume to have been in time,—what happened was this: The registrar was ready. The respondent and his attorney did not attend; their attendance not being necessary if they had no objection to the proposed sureties. The appellants attended; but one of the sureties did not appear, and the appellants' attorney was not there with the bond. From that day no further notice of any of the proceedings appears to have been given to the respondent. On the 26th the appellants' attorney sent a bond to the office, with an intimation that all the parties would be there to execute it on the following Monday, the 28th. They accordingly attended on that day: but, the registrar being absent, they were directed by a clerk in the office to attend again on the 30th. They did so attend, and the bond was executed by the appellants and their sureties on that day. The question is, whether under these circumstances the provisions of s. 14 of the Act have been complied with.

The matter has come under the consideration of the Court of Queen's Bench and of this Court upon three different occasions. The first case was *Stone* v. *Dean* (1), which occurred in the time of Lord Campbell. The decision of the county court judge was pronounced on the 10th of March. On the 20th notice of appeal was given, and on the 13th a draft case was delivered by the appellant to the respondent. On the 14th, being the next court day, the respondent's attorney objected before the judge that the case ought not to be settled, as no security had been given. The judge

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(1) E. B. & E. 504; 27 L. J. (Q.B.) 319.

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overruled the objection, and adjourned the settling of the case to a future day, directing that security should be given in the meantime; which was done. The Court of Queen's Bench struck out the appeal, holding that the provisions of s. 14 had not been complied with. That decision took place in 1858. Ten years afterwards the question again came before the Court of Queen's Bench in *Waterton* v. *Baker.* (1) There the hearing of an interpleader issue took place on the 22nd of October, 1866. The judge reserved his judgment and adjourned the summons to the 16th of November, the next court day. He however gave judgment,—or rather intimated to the registrar what his judgment was,—on the 3rd of November, the judge deciding in favour of the plaintiff, ordering the judgment to be entered up as of the 22nd of October. On the 6th the claimant received a copy of the judgment, and on the 12th he sent by post to the registrar and to the plaintiff's attorney a notice of his intention to appeal. On the 16th the claimant attended at the county court and handed to the registrar a draft bond with the names of the proposed sureties, for his approval. The draft bond was returned approved by the registrar on the 18th, and on the following day the claimant sent by post to the plaintiff's attorney a notice in writing of his proposed sureties. On the 28th he wrote to the plaintiff's attorney requesting that he might be informed whether the sureties were approved of, and received an answer from the attorney asking for information as to who and what the sureties were. A correspondence then ensued, in the course of which the plaintiff's attorney was repeatedly remonstrated with by the claimant for his delay, and urged to state whether or not he approved of the sureties. On the 17th of January, 1867, the registrar gave notice to the claimant to attend before him on the 21st to execute the bond, and gave notice to the plaintiff's attorney that if the plaintiff had any valid objection to make to the sureties proposed by the claimant, it was then to be made. The claimant attended on the 21st of January, but the plaintiff did not appear; and the bond was executed, with the original sureties. Upon a motion to strike out the appeal, on the ground that the requirements of s. 14 of the Act, and rule 134, had not been complied with, *Stone* v. *Dean* (2) and *Norris* v. *Car-*

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(1) Law Rep. 3 Q. B. 173.

(2) E. B. & E. 504; 27 L. J. (Q.B.) 319. 4 Jur. N.S. 534

rington (1) being cited, Cockburn, C.J., said (2): "Although the judgment of the county court has been entered as of the 22nd of October, it cannot have been deemed to have been pronounced so as to be the subject of appeal until the 16th of November; and on that day the claimant tendered to the registrar a bond with the names of the sureties; that is, I think, a sufficient compliance with the requirements of the statute so far as giving notice to the registrar is concerned. Then, in compliance with rule 134, the appellant not only gave notice to the attorney for the plaintiff of his intention to appeal and give security, but he also gave the names of his sureties, and the attorney,—as he was perfectly justified in doing,—required further information as to who the sureties were, and took time to make inquiries. The delay which has occurred is not the act of the claimant. It would be exceedingly hard and unjust upon a party that he should be debarred from appealing, because the registrar from some cause or other, such as sickness, or requiring further information, is unable to complete the matter in due time; and à fortiori if the delay occurs because the other party wants time to make further inquiries. I think the fair construction of the statute is, that a party, so far as in him lies, must within the prescribed time offer the security and be ready to make it effectual. If he does that, and afterwards completes the security, he has done all that he is bound to do, and is entitled to his appeal. This decision in no way conflicts with the two cases which have been cited." The rest of the Court concurred, and the rule was refused. I must confess I should have thought that the very words of the Act had been complied with there. I think the appellant did all that he was bound to do when he gave notice of appeal and tendered a bond with the names of sureties within ten days. I incline to think it is not necessary that the bond should be actually executed within the ten days. It is enough, however, to say that those two cases do not apply here. *Park Gate Iron Co.* v. *Coates* (3) no doubt goes somewhat further. There the performance by the appellant of the requirements of the Act was waived by the respondent. None of the cases cited, therefore, will serve the appellants upon this occasion. Assuming that the 24th of July was properly fixed by the registrar for the execution of the bond,—though that is going further than either *Stone* v. *Dean* (1) or *Waterton* v. *Baker* (2),—it is plain that the appellants were then in default. The sureties were not ready, and the bond was not there. There has been no compliance with the requirements of s. 14, and no waiver. Upon the true construction of the Act of Parliament, therefore, and upon the authority, as I think, of the two cases last cited, I am of opinion that this rule should be made absolute.

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(1) 16 C. B. (N.S.) 10.

(2) Law Rep. 3 Q. B. at p. 176.

(3) Law Rep. 5 C. P. 634.

Brett, J. The rule calls upon the Court to strike out an appeal, on the ground that the appellants have not complied with the provisions of s. 14 of 13 & 14 Vict. c. 61, and rule 191 of the County Court Rules of 1868, by giving notice of appeal with the grounds of appeal and security within ten days after the decision of which they complain. It was formerly held that the giving of notice and security within the ten days was a condition precedent, and unless it was complied with the superior Court had no jurisdiction to hear the appeal. *Stone* v. *Dean* (1) is said to have gone that length. I adhere to what I said in *Park Gate Iron Co.* v. *Coates* (3), that that proposition cannot be maintained; a strict compliance with the requirements of s. 14 is not a condition precedent to the jurisdiction of the Court. If it were, the Court of Queen's Bench could not have acted as it did in *Waterton* v. *Baker* (2), or the Common Pleas in *Park Gate Iron Co.* v. *Coates.* (3) But I take it that the section and the rule give the respondent certain rights. According to *Stone* v. *Dean* (1) the appellant is not to be heard unless he has done all that the respondent is entitled to have done. The respondent is entitled to have a notice of his opponent's intention to appeal, together with the grounds thereof, within ten days after the decision of the judge is pronounced, and to have a security completed at the time appointed by the registrar. I incline to think that, if notice be given within the ten days, and the registrar appoints a day for the completion of the security after the expiration of the ten days, the appellant having done all he can to comply with the statute

(1) E. B. & E. 504; 27 L. J. (Q.B.) 319. 4 Jur. N.S. 534.

(2) Law Rep. 3 Q. B. 173.

(3) Law Rep. 5 C. P. 634.

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and rule, the respondent's rights have not been infringed. The cases shew two things which may operate to excuse the appellant from a strict compliance with the statute,—1. if such compliance is rendered impossible by the act of the county court judge himself,—2. if performance of the conditions be prevented or waived by the respondent. Thus, if the judge were to pronounce judgment at one court day, and to state the grounds of his decision at a future day after the expiration of the ten days, the appellant might be unable to shew his grounds of appeal. In that case I think that, if the grounds were given as early as possible after the latter day, the delay would be the act of the Court, and the appellant would be excused. So, if the appellant has given his notice and the grounds, with the names of his sureties, in due time, and an appointment is given to him to attend and complete the security, if, for the convenience or by the default of the registrar,—the appellant being ready with the bond and the sureties,—the appointment is postponed to a future day, I should say that the appellant had done all that was required of him, and was entitled to have his appeal heard. That was the case of *Waterton* v. *Baker*. (1) So, if the respondent chooses to waive the security, I apprehend the appellant would be entitled to have his appeal heard without any security being given. Where, therefore, the appellant has done all that he could do to comply with the requirements of the statute and the rule, and is prevented by the act of the Court or of the respondent from doing so strictly, he is not to be deprived of his appeal. But, if the appellant, having no such excuse, fails to do what is required of him, the respondent has a right to come to the Court and have the appeal struck out. That seems to have been the true decision in *Stone* v. *Dean*. (2) It seems to me that the notice of appeal in this case was given in due time, and with as good grounds of appeal as the appellants could give, not having been furnished with a copy of the judgment. It also seems to me that the registrar was justified in naming the 24th of July for perfecting the security; and, if the appellants had come prepared on that day, the absence of the registrar would not have ousted them of their right to appeal. But on the 24th the sureties were not there, and the bond was not there; therefore the appellants were

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(1) Law Rep. 3 Q. B. 173.

(2) E. B. & E. 504; 27 L. J. (Q. B.) 319.
4 Jur NS 534

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clearly in default. If, indeed, the attorney for the appellants had been misled by the registrar into the belief that he was still in time, possibly that might have afforded some excuse. But I see nothing upon the affidavits to warrant that. I come to the conclusion that the appellants ought to have been ready to complete the security on the 24th of July. They were not ready, and were not prevented by any act of the Court or the registrar from being ready; and there has been no waiver by the respondent of his right to have security on that day. Acting, therefore, upon *Stone* v. *Dean* (1) alone, I should hold that the rule should be discharged.

DENMAN, J. I am of the same opinion. The statute gives a right of appeal on the terms of notice and security being given within ten days. *Stone* v. *Dean* (1) is supposed to have held that a strict compliance with the statute is a condition precedent. What I understand by that is, that the appellant cannot prosecute his appeal unless he has done all that the statute requires of him. I do not understand the Court to have laid it down that in no possible case would they dispense with the strict and literal performance of the requirements of the statute. In *Waterton* v. *Baker* (2) it was not necessary to decide more than the Chief Justice says, viz. that it is enough if the appellant does all that in him lies to comply with the requirements of the statute and rule. That decision, as his lordship observes, in no way conflicts with *Stone* v. *Dean.* (1) *Park Gate Iron Co.* v. *Coates* (3) merely decides that, where the respondent chooses to waive the giving of security, the Court may still hear the appeal. Consistently with all these cases, if there had been any evidence of waiver here, we might have allowed this appeal to stand, notwithstanding the appellants had failed strictly to comply with the statute. But it is said that, although no security was actually given within the ten days, notice having been given within that time, we would be justified in allowing this appeal to stand, by reason of what subsequently took place by arrangement with the registrar. I apprehend, however, there are only two possible grounds upon which the Court can dispense with the performance of the things which the statute and the rules of practice require. One is, in the case of waiver, of which there is no evidence here. The other is, where the judge or the registrar has so conducted himself as to make the maxim, "Actus legis nemini facit injuriam," apply, and there has been no default in the appellant himself. The facts do not establish either of those cases. There was delay here; but, assuming that the registrar was right in appointing the 24th of July for completing the security, the appellants were not even then prepared. The non-compliance, therefore, with the requirements of the statute and the rule was the result of their own laches, and was not due to any act of the Court, or to any waiver on the part of the respondent.

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(1) E. B. & E. 534; 27 L. J. (Q.B.) 319. 4 Jur. NS 534

(2) Law Rep. 3 Q. B. 173.

(3) Law Rep. 5 C. P. 634.

Rule absolute.

Merewether, in the following term, moved to restore the appeal to the list, on payment of all costs, on the ground that the registrar (upon whose affidavit the Court had mainly relied in coming to the conclusion they did) had made a mistake, as was apparent by his own letter; and that, in truth, all the parties did attend on the 24th of July, and were ready to execute the bond, but that the appointment was postponed for the convenience of the registrar himself. No application had been made to the registrar on the subject.

LORD COLERIDGE, C.J. I am of opinion that there is no ground for this application. It would be of the worst possible example if a matter like this could be re-opened upon contradictory affidavits.

KEATING, J. I agree with my lord. It is unnecessary to say what we might have been disposed to do if the statement now made had been confirmed by the registrar, and he had acknowledged that he had made a mistake.

GROVE, J., concurred.

Rule refused.

Attorney for plaintiff: *W. Stimson, Bedford.*

Attorneys for defendants: *Lewis, Munns, & Longden, for J. G. Shepherd, Luton.*

In re POOLE ELECTION PETITION.

1874
April 20.

HURDLE and Another, Petitioners; WARING, Respondent.

Parliament — Return of Member — Time for filing Petition — Parliamentary Elections Act, 1868 (31 *&* 32 *Vict. c.* 125), *s.* 6, *subs.* 2—*Ballot Act*, 1872 (35 *&* 36 *Vict. c.* 33), *s.* 2, *and sched.* 1, *rule* 44.

Pos 708, 7
713, 7
1 CPD 8

The "return" of a member to serve in Parliament is not made until the writ with the certificate of the returning officer indorsed thereon reaches the hands of the clerk of the Crown in Chancery so that he may act upon it.

The election of a member for Poole took place on the 3rd of February. On the morning of the 4th, the returning officer indorsed on the writ a certificate of the return of W., and delivered it to the postmaster at Poole, who forwarded it by the 12.30 p.m. mail, properly addressed and indorsed to the General Post Office in London, where it arrived about 6 p.m. It was sent thence by special messenger to the office of the clerk of the Crown at Westminster, where it arrived between 8 and 9 the same evening. The office being closed, the document was left with a servant of the housekeeper, and consequently did not reach the clerk of the Crown or any one connected with the office until the morning of the 5th:—

Held, that the twenty-one days for the filing of a petition under s. 6, subs. 2, of the Parliamentary Elections Act, 1868, reckoned from the 5th.

The election for the borough of Poole took place on the 3rd of February, 1874. On the morning of the 4th the sheriff, having counted the votes in the presence of the agents for the respective candidates, pursuant to the direction of s. 2 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), certified, under rule 44 of the first schedule to that Act, on the back of the writ of election, as follows:—"I certify that the member elected for the borough of Poole in pursuance of the within-written writ is Charles Waring, of 29, Norfolk Street, Park Lane, in the county of Middlesex, contractor for public works. Poole, Feb. 4th, 1874. Robert Pike Ayles, sheriff of the town and county and borough of Poole." At 12 at noon of the same day the sheriff delivered the writ and certificate to the postmaster at Poole, by whom it was inclosed in an envelope addressed to "The Clerk of the Crown in Chancery, London," and dispatched to London by the 12.30 p.m. mail. The packet arrived at the General Post Office a few minutes after 6 o'clock the same evening, and was sent by a special messenger to the office of the clerk of the Crown at Westminster, where it arrived between 8 and 9 o'clock. The office being closed (1), the messenger left the packet with Kate Phipps, a servant of the housekeeper, Ellen Lovegrove, who is appointed and paid by the Lord Chamberlain, and whose sole duty it is to take care of and keep clean the offices (amongst others) of the clerk of the Crown. On the following morning the housekeeper delivered the packet to Mr. James Zwinger, the principal clerk in the office of the clerk of the Crown, who put upon it the date of receipt thus,—"Crown Office, 5th Feb. /74. J. Z."

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(1) The hours of attendance when Parliament is not sitting are from 10 till 2.

The practice of the office with regard to the return of writs for the election of members to serve in Parliament appeared to be as follows:—A book called the "Return Book" is kept at the office, in which book entries are made by the clerks (of whom there are three subordinate to the clerk of the Crown) of the return of all writs for the return of members to serve in Parliament, together with the dates on which such returns come to the hands of one of the clerks. This book contained an entry of which the following is a copy,—"Feb. 5th, 1874. Town of Poole. Robert Pike Ayles, sheriff, returned the writ and certified that Charles Waring, of 29, Norfolk Street, Park Lane, in the county of Middlesex, contractor for public works, was elected a member for the said town." From this book is compiled another, also called the "Return Book," for the use of Parliament, which contains similar entries, and is signed by the clerk of the Crown and sent by him to the clerk of the House of Commons, and which is the only authority on which the House acts in regard to the swearing in of members. This last-mentioned book (which by order of the Court was produced on the argument of the rule) had written on the fly-leaf the following memorandum:—"Delivered to me by the clerk of the Crown the 5th day of March, 1874. J. Erskine May, Clerk of the House of Commons. The names of the members returned to serve in the 21st Parliament of the United Kingdom of Great Britain and Ireland, summoned to meet at Westminster the 6th day of March, 1874, as by the several returns filed in the office of the clerk of the Crown in Chancery appears." The entry in this book relating to Poole originally stood thus,—"February 5th. Town of Poole. Charles Waring, Esq.;" but the date had been subsequently struck through, and "February 4th" substituted. It did not however appear that the date of the receipt of the return indorsed on the writ by Zwinger had been altered.

The old mode of returning members of Parliament was by an indenture executed by the sheriff or other returning officer, which was always brought to the office of the clerk of the Crown by the returning officer himself or his agent,—the person bringing it indorsing upon it the date of delivery and paying a fee. If an indenture was brought after office hours, when no clerk was there, the housekeeper had no authority to receive it or to take the indorsement or the fee; this never being done except by a properly authorized clerk of the clerk of the Crown.

A petition was presented on the 2nd of March, complaining of the undue return of Mr. Waring.

April 16. *McIntyre, Q.C.*, obtained a rule calling upon the petitioners to shew cause why the petition should not be taken off the file, on the ground that it was not presented in due time.

Giffard, Q.C., and *W. C. Harrison*, shewed cause. The petition must be presented within twenty-one days (1) after the return made to the clerk of the Crown in Chancery: 31 & 32 Vict. c. 125, s. 6, subs. 2; and the mode of making the return is pointed out by 35 & 36 Vict. c. 33, s. 2, par. 3, and rule 44 of the 1st schedule to that Act, viz. by the certificate of the returning officer indorsed upon the writ of election. The question here is whether the return of Mr. Waring was made on the 4th or on the 5th of February; if on the last-mentioned day, the petition was in time; if on the first-mentioned day, it was too late. Now, the facts are these:—The writ and certificate were transmitted through the post, addressed to the clerk of the Crown, and it arrived in London in the evening of the 4th of February. But, in consequence of its not arriving within office hours, it did not actually reach the hands of the clerk of the Crown, or of any person authorized to receive it for him, until the morning of the 5th. Until that day, therefore, there was no return which was or could be acted on by any person authorized to act upon it: and the petitioner, who relied upon the information which he received from the office of the clerk of the Crown, is in no default. The delivery of the packet containing the writ and certificate to Kate Phipps was in no sense a "return made to the clerk of the Crown;" it was no more than if it had been dropped into a letter-box after office hours. Unless a delivery to the postmaster at Poole was a return (which will scarcely be contended), there clearly was no return until the 5th. The 44th rule gives the returning officer the option of transmitting the writ and certificate by post; but that is all: the delivery to the postmaster is not declared to be equivalent to a delivery to the clerk of the Crown. All acts which are required to be done by a certain day,—such as the delivery of pleadings, the presentment of a bill of exchange, or the like,—must be done within office hours; and a document is never held to be filed until it has come to the hands of the proper officer in the proper office with intent that it shall be so dealt with: *Garlick* v. *Sangster* (1); *Ransford* v. *Maule.* (2)

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(1) Exclusive of Sunday, Christmas-day, Good Friday, and any day set apart for a public fast or public thanksgiving: s. 49.

[BRETT, J. I do not think that cases as to the filing of documents are very analogous to the matter in hand.]

Under the old practice, the return of a member was by an indenture executed by the returning officer and delivered by him to the clerk of the Crown. It never was suggested that the mere execution of the indenture by the returning officer, or the leaving it at the office of the clerk of the Crown with a person who had no authority to deal with it, was a good return. To be a compliance with the Act of Parliament and the rule, the return must be effectively made. In the case of an appeal from a decision of justices under 20 & 21 Vict. c. 43, s. 2, the case must be lodged with the superior Court within three days. This was held to be imperative in *Banks* v. *Goodman.* (3) Blackburn, J., there says (4): "One condition of an appeal of this kind being heard is, that the appellant shall within three days transmit it to the superior Court; and the question is, has that been complied with? As at present advised, I think the condition not complied with until the transmission is complete,—until the case is lodged with the Court." He goes on to suggest,—"Perhaps, if the case had been put in the possession of an independent third party, e. g. the post-office, and so put out of the control of the appellant, and there had been default in the post-office, that would do: but I should be sorry if anything I say were to encourage appellants to trust such matters to the post." To lay a foundation for that, however, there must, it is submitted, be some statutory provision to make a delivery to the post-office a delivery to the party who is to receive the document; as in 6 Vict. c. 18, s. 101. Suppose this writ and certificate had been delivered into the hands of one of the clerks at his private residence, could that be said to be a "return made to the clerk of the Crown in Chancery?"

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(1) 9 Bing. 46.

(2) Law Rep. 8 C. P. 672.

(3) 3 B. & S. 548; 32 L. J. (M.C.) 87.

(4) 3 B. & S. at p. 555.

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McIntyre, Q.C., *Chandos Leigh*, and *C. Bowen*, in support of the rule. The return is made as soon as the writ and certificate come to the hands of a person duly authorized to receive it at the office of the clerk of the Crown; filing is not necessary. Here, they were received by a person who was left in charge of the office in the absence of the clerks, and who was authorized to receive letters and documents for the clerk of the Crown.

[BRETT, J. And to act upon them?]

It is not denied that a delivery of the return to one of the clerks in the office would be sufficient; and his duty with respect to it would be ministerial only. Suppose the packet had been delivered by the housekeeper, or by Kate Phipps, to the clerk of the Crown himself on the 4th, though after office hours, would not that have been a good return on that day, notwithstanding no entry was made in the "Return Book" until the next day?

[BRETT, J. Possibly it would. The return is complete so soon as it comes to the hands of the proper officer, so that he can act upon it. What he actually does with it cannot be material.]

Having the option of transmitting the return by post, the returning officer discharges himself from all responsibility with regard to it when he delivers it to the postmaster. The latter is made the agent of the clerk of the Crown for the transmission of it.

[BRETT, J. If that had been the intention of the legislature, it was easy to say so. The Registration Act, which has been referred to, contains a specific enactment that "it shall be sufficient" if the notice be delivered by the post, &c. It required an express enactment to create such an anomaly.]

The petition may be presented on the last day, up to 12 o'clock at night, by dropping it through a slit in the door of the Master's office; and, upon an affidavit that that was done within the prescribed time, the petition is taken to have been duly presented.

[BRETT, J. By rule 1 of the rules made in Michaelmas Term, 1868, under the authority of the Parliamentary Elections Act, 1868, it is expressly provided that "the presentation of an election petition shall be made by *leaving it at the office* of the master." That pre-supposes that there may be nobody there to receive it. There is no such rule under the Ballot Act.]

Suppose the writ and certificate were burnt or lost in transit, would not the delivery to the postmaster be sufficient?

[DENMAN, J. Could the clerk of the House of Commons under such circumstances authorize the person elected to go into the House to vote for a speaker?]

The transit determined when the return reached its destination, without reference to office hours, when it came into the hands of a recognised agent at the office. It is like the delivery of a notice to quit to a servant on the premises.

LORD COLERIDGE, C.J. This is an application to the Court to take an election petition off the file, on the ground that it was not presented within twenty-one days after "the return made to the clerk of the Crown in Chancery," as required by s. 6, subs. 2, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125). The facts are as follows:—The election for the borough of Poole took place on the 3rd of February, 1874. On the morning of the 4th the sheriff indorsed on the writ, "I hereby certify that the member elected for the borough of Poole in pursuance of the within-written writ is Charles Waring, of &c.;" and at noon of that day he inclosed it in a registered letter addressed to the clerk of the Crown in Chancery, and delivered it to the postmaster at Poole, whence it was transmitted to London by the 12.30 mail on the same day, and it arrived at the General Post Office at about six o'clock in the evening, and was dispatched to the office of the clerk of the Crown in Chancery at Westminster,

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where it arrived between eight and nine o'clock. This being after office hours, there was no person there to receive it but Kate Phipps, who was the servant of the housekeeper there, who was in the habit of receiving letters and papers delivered at the building before the arrival and after the departure of the clerks. This person is not appointed by the clerk of the Crown, but is appointed and paid by the Lord Chamberlain. I do not, however, found my judgment on that. As a matter of fact, the return reached the building in which the office is situate on the evening of the 4th of February; but it was not received by the clerk of the Crown until the morning of the 5th. The question we have to determine is whether the petition complaining of that return was presented in due time. If the return to the clerk of the Crown was made on the 5th, the petition was in time; if on the 4th, it was too late. In order to determine this question, we have to put a construction upon two expressions in two sections of two Acts of Parliament, and upon rule 44 of the 1st schedule to one of those Acts. The first clause to be considered is subs. 2 of s. 6 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which provides that "the petition shall be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery." Then, s. 2 of the Ballot Act (35 & 36 Vict. c. 33), after stating what the returning officer is to do with the ballot boxes after the close of the poll, has these words, "and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the clerk of the Crown in Chancery." The words of these two sections are for all practical purposes the same. The 44th rule of the first schedule to the Ballot Act, 1872, provides that "The return of a member or members elected to serve in Parliament for any county or borough shall be made by a certificate of the names of such member or members under the hand of the returning officer indorsed on the writ of election for such county or borough; and such certificate shall have effect and be dealt with in like manner as the return under the existing law; and the returning officer may, if he think fit, deliver the writ with such certificate indorsed to the postmaster of the principal post-office of the place of election, or his deputy, and in that case he shall take a receipt from the postmaster or his deputy for the same; and such postmaster or his deputy shall then forward the same by the first post, free of charge, under cover, to the clerk of the Crown, with the words 'Election Writ and Return' indorsed thereon." An ingenious argument has been addressed to us, founded upon the 44th rule of the 1st schedule to the Ballot Act, viz. that the return is complete when the physical act of making the certificate by the sheriff and transmitting it to the office of the clerk of the Crown through the instrumentality of the post-office is performed. Without pretending to say that the matter is entirely free from difficulty, I am of opinion that that argument cannot prevail. It seems to me that the true meaning of the two sections is that the return is to be made in such sense that the clerk of the Crown can act upon it and has the means of doing that which the law has prescribed to be done by him. Now, what has the clerk of the Crown to do upon a return being made to him? He has to enter in a book called the "Return Book" the names of the several members returned to serve in Parliament, with the dates of their respective returns, and to transmit what is in substance a copy of that book to the clerk of the House of Commons; and then, and not until then, the members are allowed to take their seats. When the House meet after a general election, for the purpose of electing a new speaker, they meet and proceed to the election before they take the oaths and their seats. What is the authority for the members so acting upon that occasion? This return which is made by the clerk of the Crown to the clerk of the House, and this return alone. And the clerk of the Crown cannot return the names of persons to act as members in the election of a speaker until he has received the writ indorsed by the returning officer. It seems to me that, as that return to him is to be followed by consequences so serious, it cannot be said to be complete until it has reached him in such a manner that he can take proper action thereon. In thus holding, it may be said that we are importing considerations of what is to be done by the officer after the return is made. That is true. But the argument that the return is made when the writ with the certificate of the returning officer indorsed upon it is delivered to the postmaster, or at all events when it is delivered to any person at the office of the clerk of the Crown, also involves considerations which have reference to the duties of the returning officer rather than to the strict meaning to be elicited from the words of the Acts of Parliament and the rule themselves. We are to determine what is the reasonable construction to be given to those words. Without saying that the matter is free from difficulty, and admitting that, to bring me to the conclusion at which I arrive, I am bound to look at circumstances beyond the Acts themselves, but which it seems to me may be fairly looked at, I think the good sense of the thing is that the return to the clerk of the Crown is not made until he has an opportunity to act upon it in the sense required by the Act. There is no injustice or inconvenience in coming to this conclusion; because, if we hold that the return is not complete until it reaches the hands of the proper officer so that he can act upon it, and he does his duty, there is a fixed point of time from which the member returned and those who seek to question the propriety of his return may know that the twenty-one days limited for the filing of a petition are to count. I think the rule should be discharged.

BRETT, J. The first statutory provision we have to consider, viz. subs. 2 of s. 6 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), is in these words, "The petition shall be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery of the member to whose election the petition relates." The phraseology of the section clearly points to a parliamentary practice which existed before the passing of that statute, and without reference to the presentation of any petition. The return was formerly made by the returning officer executing an indenture, and that indenture was executed at the place and time of election. It has never been held that the mere execution of that indenture by the returning officer at the place and time of the election was the return of the member. The indenture was usually transmitted to the clerk of the Crown in Chancery by a special messenger. If the returning officer chose to send it by post, he was responsible for its safe arrival. It was not sent for the mere purpose of its being received by the clerk of the Crown; but in order that he might enter and make a return of it to the clerk of the House of Commons. The important matter was that the return should be made by the returning officer to the clerk of the Crown and by him to the clerk of the House, because it was that alone which enabled the member to be admitted to vote in the choice of a speaker. It was impossible to say that the return had been made until the indenture was brought to the attention of the clerk of the Crown so that he was called on to act upon it. From the moment when the indenture came to his hands so that he might act upon it, and from that moment only, the return was complete. If that be so, what is the meaning of the same phrase in the Ballot Act, which was passed in 1872? The 2nd section enacts that, "after the close of the poll the ballot-boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot-boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the clerk of the Crown in Chancery." I apprehend that, under that statute, the evidence of the return would be the same as under the old practice, viz. the communication of it by the returning officer to the clerk of the Crown. The question is whether the provision in s. 2 is in any way modified by the 44th rule in the 1st schedule to the Act. The first part of that rule says that "the return of a member or members elected to serve in parliament for any county or borough shall be made by a certificate of the names of such member or members under the hand of the returning officer indorsed on the writ of election for such county or borough." It cannot be said that the return is made as soon as the certificate is signed. What, then, is to be the effect of the substitution of the certificate of the returning officer for the indenture? The rule goes on: "and such certificate shall have effect and be dealt with in like manner as the return under the existing law." Now, under the old law, the mere execution of the indenture had not the effect of a return. The certificate is to have the same effect as the return under the existing law, that is, when delivered to the clerk of the Crown in the same way as the indenture was, and when acted upon to the same extent. The rule then goes on to point out one particular mode of delivering the writ with the certificate indorsed thereon to the clerk of the Crown,—"and the returning officer may, if he think fit, deliver the writ with such certificate indorsed to the postmaster of the principal post-office of the place of election, or his deputy, and in that case he shall take a receipt from the postmaster or his deputy for the same; and such postmaster or his deputy shall then forward the same by the first post, free of charge, under cover, to the clerk of the Crown, with the words 'Election Writ and Return' indorsed thereon." If the returning officer adopts that mode of transmission, he absolves himself from all responsibility as to the return reaching its destination. But the rule does not make that a delivery to the clerk of the Crown. It is the duty of the postmaster to forward it; but, in order to constitute a complete return, the document must come to the hands of the officer whose duty it is to act upon it, so that he may act upon it. That being so, the only remaining question is whether this election writ with the certificate indorsed thereon,—this return,—was made to the clerk of the Crown in Chancery on the 4th of February. It was delivered between eight and nine o'clock in the evening of that day to a person who was not authorized to act upon it in any way, and it did not and could not come to the hands of the clerk of the Crown until the following morning. I entirely agree with my Lord in the interpretation which he has put upon the statutes and the rule, and therefore think that this petition was presented in due time.

DENMAN, J. I am of the same opinion. The 6th section of the Parliamentary Elections Act, 1868, provides that a petition complaining of an undue return of a member shall be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery of the member to whose election the petition relates. I can hardly say that I agree with my Lord as to the meaning of those words. He seems to think that they are somewhat ambiguous; but, looking at the duties which are to be performed by the clerk of the Crown, I think we are bound to read the words "after the return has been made to the clerk of the Crown," after such return has been effectively made to the clerk of the Crown so as to enable him to act upon it. The question is whether there is anything in the Ballot Act of 1872 to repeal or alter that. It is a general rule in the interpretation of Acts of Parliament that an Act is not to be repealed by implication from the language of a subsequent Act, unless such language is altogether inconsistent with the former Act. I see nothing in the Ballot Act that is inconsistent with or capable of being construed as a repeal of s. 6, subs. 2, of the Parliamentary Elections Act, 1868. The last-mentioned Act must therefore receive the same construction as it would have received before the passing of the Ballot Act. I think the return is not made to the clerk of the Crown until it is made in such a way that he can act upon it. The delivery of the packet to Kate Phipps could not in any sense make it a return to the proper officer.

Rule discharged.

Agents for petitioner: *Cope, Rose, & Pearson.*
Agents for respondent: *C. C. Ellis & Co.*

April 18.

IN RE PETERSFIELD ELECTION PETITION.

STOWE, PETITIONER; JOLLIFFE, RESPONDENT.

10C8741

Parliamentary Election Petition—Inspection of Documents—Ballot Act, 1872 (35 *&* 36 *Vict. c.* 33), *sched.* 1, *rules* 29 *to* 43—"*Marked Register*"—"*Rejected Ballot Papers*"—"*Counterfoils of Ballot Papers.*"

By rule 29 of the 1st schedule to the Ballot Act, 1872 (35 & 36 Vict. c. 33), the presiding officer is required, at the close of the poll, to make up into sealed packets, amongst other things, "the tendered ballot papers," and "the marked copies of the register of voters and the counterfoils of the ballot papers," and to deliver such packets to the returning officer. By rule 34 the returning officer is to count and record the ballot papers and count the votes in the presence of the agents of the candidates, if desired, taking all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers. He is then to indorse "rejected" on any ballot papers which he may reject as invalid, and report the number of ballot papers rejected by him to the clerk of the Crown, and allow the agents to copy such report. Upon the completion of the counting, the returning officer is, by r. 37, to seal up in separate packets the counted and

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rejected ballot papers; he is not to open the sealed packet of ballot papers or marked copy of the register of voters and counterfoils, but to proceed, in the presence of the agents, to verify the ballot paper account given by each presiding officer, by comparing it with the number of ballot papers recorded by him, and the unused and spoilt ballot papers in his possession, and the tendered votes list, and to reseal each sealed packet after examination. And by r. 38 the returning officer is to forward all the packets of ballot papers, &c., in his possession, indorsing on each packet a description of its contents and the date of the election to which they relate, and the name of the county or borough.

Rule 41 provides that "no person shall, except by order of the House of Commons or any tribunal having cognizance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the clerk of the Crown;" but that "such order may be made, subject to such conditions as to persons, time, place, and mode of opening or inspection, as the House or tribunal making the order may think expedient; provided that, on making and carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid." And rule 42 provides that all documents forwarded by a returning officer in pursuance of this Act to the clerk of the Crown, other than ballot papers and counterfoils, shall be open to public inspection at such time and under such regulations as may be prescribed, and copies supplied, &c.:—

Held, that it is competent to the Court to grant inspection and a copy of *the marked register of voters*, upon an affidavit by the agent of a petitioner that, in his judgment and belief, it is requisite for the purposes of the petition and for enabling him duly to prepare the case of the petitioner that he should be allowed to inspect the same; and this notwithstanding the marked register was contained in the same sealed packet with *the counterfoils of ballot papers*.

Held, per Brett, J., that the inspection should be extended to the *backs* of the "rejected ballot papers" and the "counterfoils."

Held, per Grove and Denman, JJ., that, assuming the Court to have power to grant inspection of the last-mentioned documents, a strong case should be made out to warrant it, and that the petitioner in this instance was not entitled to inspection.

Semble, per Brett, J., that the practice of granting inspection of documents under the Ballot Act should be regulated by the same rules which guide the Courts in granting inspection in ordinary cases, proper precautions being taken not to violate the secrecy of voting which it was the object of the Act to insure.

A PETITION under the Parliamentary Elections Act, 1868, against the return of the respondent as member for the borough of Petersfield alleged, amongst other things, that, at that election, many persons voted and were reckoned upon the poll for the respondent who were guilty of bribery, treating, undue influence, or corrupt practices, and who were by bribery, treating, and undue influence induced to and did vote thereat for the respondent; that many persons who were registered as voters for the borough were admitted to vote and did vote for the respondent who were and had been disqualified by legal incapacity to vote and were prohibited from voting by divers statutes in force at the time of such election; that many persons voted for the respondent who were disqualified to vote at the said election by reason of their holding or having held disqualifying employments, or having been retained, hired, or employed for all or some of the purposes of such election for reward by or on behalf of the respondent at the said election, as agents, canvassers, clerks, messengers, or other like employments, and such votes were admitted and entered as good votes for the respondent; that many persons voted for the respondent who were not legally qualified or entitled to vote, but who personated or voted for other persons duly entitled to vote, whose names appeared upon the register of voters, and who did not vote at the said election; that many persons voted for the respondent who had become disqualified to vote and were incapable of voting at the said election, on the ground of their having received parochial or other alms or relief; and that certain persons voted for the respondent who were not duly qualified to be on the register of voters for the borough, or who were on the register but not entitled to vote.

The petition was presented on the 15th of February last; and on the 17th of March a summons was taken out calling upon the respondent to shew cause why the petitioner, his attorney or agent, should not be at liberty to inspect the ballot papers and counterfoils in the custody of the clerk of the Crown in Chancery relating to the last election for Petersfield, pursuant to ss. 40 and 41 of the Ballot Act, 1872.

The affidavit of the petitioner's attorney in support of that application stated that, "in his judgment and belief, it was requisite, for the purposes of the petition and for enabling him duly to prepare the case of the petitioner, that he should be allowed to inspect and should inspect the rejected ballot papers, the counted ballot papers, and the counterfoils of ballot papers now in the custody of the clerk of the Crown in Chancery."

Upon the hearing of the summons before Cockburn, C.J., and Grove, J., at Chambers, it was urged on the part of the petitioner that, without precise information as to who the persons were who voted at the election, great unnecessary expense would be incurred in getting up the petitioner's case, inasmuch as a number of witnesses might be called at the trial to impeach the vote of a person who had not in fact voted at all. The learned judges, however, held that no case had been made out for the production of the ballot papers or counterfoils, because the information sought would be afforded by the marked copy of the register, which by r. 38 of the first schedule to the Ballot Act, the returning officer is required to forward to the clerk of the Crown in Chancery, and which is amongst the documents that, under r. 41 of that schedule, are to be "open to public inspection at such time and under such regulations as may be prescribed by the clerk of the Crown in Chancery, with the consent of the speaker of the House of Commons." And no order was made.

April 15. *J. O. Griffits* obtained a rule calling upon the respondent to shew cause why a writ of mandamus should not issue to the clerk of the Crown in Chancery directing him to exhibit to the petitioner or his attorney the marked register of voters at the Petersfield borough election, the counterfoils of the ballot papers, and the rejected ballot papers, subject to such conditions as the Court might think expedient. The affidavit upon which the motion was founded, after describing what had passed on the hearing of the summons at Chambers, stated that application had been made to the clerk of the Crown for inspection of the marked register, but that its production was refused on the ground that the returning officer had included in one package all the documents which under r. 38 of the first schedule to the Ballot Act he was bound to forward to the clerk of the Crown, and that officer considered that he had no right to open the package.

April 17, 18. *W. G. Harrison* and *Couch* shewed cause, upon affidavits stating that the attorney for the petitioner acted as election agent and election expenses agent, and agent for personation and to attend the casting of the votes at the election, and was present at the polling booth during the whole of the day of polling at the election, and was also present at the counting of the votes at the election, and examined all the rejected ballot papers, and was fully aware of the grounds upon which they were rejected.

The material rules contained in the first schedule to the Ballot Act (35 & 36 Vict. c. 33) are the 29th, 36th, 37th, 38th, 40th, 41st, and 42nd. The 29th provides that "the presiding officer of each station, as soon as practicable after the close of the poll, shall, in the presence of the agents of the candidates, make up into separate packets sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals—1. Each ballot-box in use at his station, unopened, but with the key attached; 2. The unused and spoilt ballot papers, placed together; 3. The tendered ballot papers; 4. The marked copies of the register of voters, and the counterfoils of the ballot papers; 5. The tendered votes list, and the list of votes marked by the presiding officer, and a statement of the number of the voters whose votes are so marked by the presiding officer, under the heads 'Physical incapacity,' 'Jews,' and 'Unable to read,' and the declarations of inability to read; and shall deliver such packets to the returning officer." Rule 36: "The returning officer shall indorse 'rejected' on any ballot paper which he may reject as invalid, and shall add to the indorsement, 'Rejection objected to,' if an objection be in fact made by any agent to his decision. The returning officer shall report to the clerk of the Crown in Chancery the number of ballot papers rejected and not counted by him, under the several heads of,—1. Want of official mark; 2. Voting for more candidates than entitled to; 3. Writing or mark by which voter could be identified; 4. Unmarked, or void for uncertainty; and shall on request allow any agent of the candidates, before such report is sent, to copy it." Rule 37: "Upon the completion of the counting, the returning officer shall seal up in separate packets the counted and rejected ballot papers. He shall not open the sealed packet of tendered ballot papers or marked copy of the register of voters and counterfoils, but shall proceed, in the presence of the agents of the candidates, to verify the ballot paper account given by each presiding officer, by comparing it with the number of ballot papers recorded by him as aforesaid and the unused and spoilt ballot papers in his possession and the tendered votes list, and shall re-seal each sealed packet after examination. The returning officer shall report to the clerk of the Crown in Chancery the result of such verification, and shall, on request, allow any agent of the candidates, before such report is sent, to copy it." Rule 38: "Lastly, the returning officer shall forward to the clerk of the Crown in Chancery (in manner in which the poll books are by any existing enactment required to be forwarded to such clerk, or as near thereto as circumstances admit) all the packets of ballot papers in his possession, together with the said reports, the ballot paper accounts, tendered votes lists, lists of votes marked by the presiding officer, statements relating thereto, declarations of inability to read, and packets of counterfoils, and marked copies of registers, sent by each presiding officer, indorsing on each packet a description of its contents and the date of the election to which they relate, and the name of the county or borough for which such election was held; and the term poll book in any such enactments shall be construed to include any document forwarded in pursuance of this rule." Rule 40: "No person shall be allowed to inspect any rejected ballot papers in the custody of the clerk of the Crown in Chancery, except under the order of the House of Commons or under the order of one of Her Majesty's superior Courts, to be granted by such Court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return; and any such order for the inspection or production of ballot papers may be made subject to such conditions as to persons, time, place, and mode of inspection or production as the House or Court making the same may think expedient, and shall be obeyed by the clerk of the Crown in Chancery. Any power given to a Court by this rule may be exercised by any judge of such Court at Chambers." Rule 41: "No person shall, except by order of the House of Commons or any tribunal having cognisance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any county ballot papers in the custody of the clerk of the Crown in Chancery: such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the House or tribunal making the order may think expedient: Provided that, on making and carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent Court to be invalid." Rule 42: "All documents forwarded by a returning officer in pursuance of this Act to the clerk of the Crown in Chancery, other than ballot papers and counterfoils, shall be open to public inspection at such time and under such regulations as may be prescribed by the clerk of the Crown in Chancery, with the consent of the speaker of the House of Commons; and the clerk of the Crown shall supply copies of or extracts from the said documents to any person demanding the same, on payment of such fees and subject to such regulations as may be sanctioned by the Treasury."

The motion is misconceived: a prerogative mandamus can only issue out of the Court of Queen's Bench.

[Brett, J. That which is asked may be done by an order of the Court.]

The summons before Cockburn, C.J., and Grove, J., at Chambers, asked for inspection of the rejected ballot papers and the counterfoils, not of the marked register. The marked register and the counterfoils of the ballot papers are to be in one and the same sealed packet: r. 29. And this can only be opened by order of the House of Commons or of this Court: r. 41.

[Brett, J. Rule 29 applies only to the "presiding officer" of the polling station. Surely this Court has power to order the seal to be broken, and the marked register alone to be produced.]

This is not a bonâ fide application: the object stated in the affidavit is that the petitioner's agent "might know with certainty the names of the persons who voted." The marked register would not shew this, but only the persons who received ballot papers. There is no necessity for making a separate packet of the counterfoils.

[Brett, J. The returning officer is to open the ballot-boxes and to count and record the number of votes: r. 34; but he is not to open the sealed packet of tendered ballot papers or marked copy of the register of voters and counterfoils: r. 37.]

The statute and rules have been carefully and guardedly framed so as to prevent an undue disclosure of the way in which a voter has voted.

[BRETT, J. It was not intended to throw any obstacle in the way of bonâ fide litigants. It is the practice of the Courts to grant inspection wherever it can fairly be done. We ought, I think, to pursue the same course here that we would in any other case. All that is intended to be kept secret is, the way a man votes, not the fact of his having voted.]

Griffits and *Lumley Smith* in support of the rule. The object of the petitioner will be attained by leave to inspect the marked register and the backs of the rejected ballot papers. These would, at all events, shew that the party intended to vote; and an inspection of them would not shew how he voted. Notice of objections cannot be given without them. Rule 41 evidently contemplates that the counterfoils shall be in a sealed packet by themselves. There is nothing unfair or unreasonable in what is asked, and no violation of secrecy can take place.

Harrison. The sealed packet containing the counterfoils cannot be opened at all: r. 37: and it is not the less to be kept inviolate because the returning officer has, whether rightly or wrongly, placed them in the same sealed packet with the marked register.

BRETT, J. In this case the application to the Court originally was for an order upon the clerk of the Crown in Chancery to open certain sealed packets sent to him by the returning officer at the Petersfield election, and to exhibit to the petitioner and his attorney the marked register of voters, the counterfoils of the ballot papers, and the rejected ballot papers. In the result, however, the application has been limited, and the order now asked for is that the clerk of the Crown may be directed to open a sealed packet said to contain the counterfoils and the marked register of voters, and, having opened it, give the petitioner and his agent inspection of the marked register, but subject to the condition that he shall not shew them the counterfoils at all, but only the marked register; and further, that the sealed packet containing the rejected ballot papers be also opened, and the *backs* only of those documents shewn to the petitioner and his agent, the petitioner being willing to accede to the condition that care be taken that the front of the rejected ballot papers be not shewn, and that they shall not leave the hands of the clerk of the Crown; and further, that the inspection of the counterfoils shall be limited to such of them as have upon them a sequence number corresponding with the number on the rejected ballot papers.

In my opinion the petitioner is entitled to have an order to that extent. Independent of the Ballot Act, the inspection of documents ought to be granted in a case of this sort as in ordinary actions. In ordinary cases either party is entitled to have inspection of all such documents in the custody or power of the other as will be useful to him in the conduct of his action or defence. But for the Ballot Act, dealing with inspection upon ordinary principles, either party would be entitled to have such inspection at the earliest moment it can be given. Before the Ballot Act, information as to what voters voted, how they voted, and whether their votes were rejected or not, was open to all, and no assistance was required. But the Ballot Act has rendered all this unattainable. The object being to preserve strict secresy as to the person or persons for whom the voter has voted, the Act has incidentally thrown considerable difficulty in the way of petitioners in the conduct of their cases. But it is for the interests of justice that litigation should be conducted in a proper manner, and that no undue obstruction should be placed in its way, so far as is consistent with preserving the real object of the Ballot Act. Acting upon that principle, it seems to me that every facility should be given for the inspection of the sealed packets, provided it can be done without interfering with the secrecy which it is the object of the Act to secure. I therefore think that the marked register ought to be accessible to the parties and to the public. According to my view of rule 29, the numbers are put merely to denote divisions of the subjects, and not to denote what is to be put in one packet. Where the legislature intended to require two or more things to be placed in one sealed packet, they say so. If this matter had been strictly and properly conducted, I think the marked register would have been in a sealed packet by itself. Somehow or other it has found its way into the same packet with the counterfoils. But by rule 41 the Court may make an order for the opening of the sealed packet of counterfoils; and I think we ought to facilitate the petitioner by ordering the packet to be opened, subject to the conditions I have mentioned, the marked register being taken out and to be open to inspection.

With regard to the rest of the proposed order, I am of opinion that we have power under rule 40 to make an order for the inspection of the rejected ballot papers, and that an order to that effect should be made, but subject to the following condition:—If the party inspecting were allowed to see the face of the ballot paper, that would be contravening the principle of the Act. The order therefore should be that the clerk of the Crown open the sealed packet of rejected ballot papers, allowing the petitioner or his agent to see the back only, and not permitting them to go out of his own hands, and that the opening of the packet shall not take place in the presence of the petitioner or his agent. But, inasmuch as shewing the backs of the rejected ballot papers would give the party no information without the corresponding counterfoils, I think these should be inspected also. By comparing the sequence number with the number on the register, it would be seen who voted, but not how he voted. This would enable the petitioner to ascertain what votes it is worth his while to test, and he would get that facility for the conduct of his case without any difficulty. In this way the object of the Act would be attained. Subject, therefore, to the conditions and restrictions I have mentioned, I think the order should go for the production and inspection of the rejected ballot papers and the counterfoils as well as of the marked register.

It is suggested that this might be done at the trial of the petition. But I think this Court is a "tribunal having cognizance of petitions," within the meaning of the 41st rule, and has power to make such an order. To postpone it till the trial would practically defeat the object of the inspection. I think justice requires that this information should be afforded to the petitioner; and I see nothing in the Act or in the rules to prevent it.

GROVE, J. I regret to say that I differ from my Brother Brett as to one portion of his judgment, though I agree (but not without some doubt) as to another portion.

As to the marked register, that is by rule 42 to be open to public inspection, under certain regulations,—" All documents forwarded by a returning officer in pursuance of this Act to the clerk of the Crown in Chancery, other than ballot papers and counterfoils, shall be open to public inspection," &c. Now, whether by accident or design, the marked copy of the register has been sealed up with the counterfoils of the ballot papers. If, in the enumeration of documents to be sealed up in rule 29, the marked register had been inserted in No. 5 instead of No. 4, there would have been a clear and defined separation of those of the documents which were to be open to public inspection and those which were not. Reading the rules in the best way I can, I think the marked register should be open to inspection. The only question is, whether we have power to order the sealed packet containing the counterfoils to be opened for the purpose of giving inspection of the marked register. I thought that a judge at chambers had no such power: but I think the Court may, and for this reason :—After providing in rule 42 that *all* documents forwarded by a returning officer to the clerk of the Crown, other than ballot papers and counterfoils, shall be open to public inspection, rule 43 speaks of an order made by the Court for the production by him of " any document in his possession." It contemplates the production, under " a rule of the Court having power to make such order," of *any* document in the possession of the clerk of the Crown. Rule 40 gives power to the Court or to a judge at chambers to allow the inspection of the rejected ballot papers, " on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose," amongst other things, " of a petition questioning an election or return." That rule, therefore, seems to contemplate a power to the Court or a judge at chambers which the election judge does not possess. It seems to me that that power may fairly be contended to extend to any document, public or private. I therefore think the order for production and inspection of the marked register may go, though not without some doubt.

But, as to the rejected ballot papers and the counterfoils, I think no case is made out for an order for their production. The application is not confined to any particular ballot papers, but in-

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spection of all the rejected ballot papers is asked for. Is this Court, in every case, to grant inspection as a matter of course upon the mere production of an affidavit of the agent that in his judgment and belief such inspection is necessary to enable him to prepare the petitioner's case? If that had been the intention of the legislature, it might have been expressed in a few lines: I do not think these long provisions would have been necessary; particularly as there is a provision elsewhere shewing how these may be seen and copies obtained. Let us look at the scope of the Act and at the sequence of the rules. Rules 32 and 33 provide that the candidates may have agents to attend at the counting of the votes. By r. 34 the returning officer, while counting and recording the number of ballot papers and counting the votes, shall keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers. By r. 37 he is to indorse "rejected" on any ballot paper which he may reject as invalid, with the ground of objection (of which four are enumerated), and to make a report to the clerk of the Crown of the number of ballot papers rejected and not counted, and to allow the agents, on request, to copy such report. Then by r. 37, the returning officer is to "seal up in separate packets the counted and rejected ballot papers." The rule then proceeds: "He shall not open the sealed packet of tendered ballot papers or marked copy of the register of voters and counterfoils, but shall proceed, in the presence of the agents of the candidates, to verify the ballot paper account given by each presiding officer, by comparing it with the number of ballot papers recorded by him as aforesaid and the unused and spoiled ballot papers in his possession and the tendered votes list, and shall reseal each packet after examination." Then he is to report the result to the clerk of the Crown, and to allow the agents of the candidates to copy such report before it is sent. The packets so sealed up by the returning officer are only to be opened under the provisions to which I am about to refer. The whole scope of those provisions is that no person, not even the clerk of the Crown, shall see the contents of these sealed packets without the order of the House or of the Court. Then comes rule 40, which provides that "no person shall be allowed to inspect any rejected ballot papers in the custody of the clerk of the Crown in Chancery, except under the order of the House of Commons or under the order of one of Her Majesty's superior Courts, to be granted by such Court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return." Was it intended by this that inspection should be granted on the mere application of the petitioner? So to hold would be to say that every petitioner is to have access to everything on a scrutiny, upon a mere suggestion that it would afford him useful information. Such would be the effect of granting what is here asked. But it does not stop there. Rule 41 provides that "no person shall, except by order of the House of Commons or any tribunal having cognizance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the clerk of the Crown in Chancery." That shews the elaborate care taken to prevent an undue exposure of the way in which any voter has voted: and all this would have been unnecessary if inspection could be had for the mere asking. Then come rules 42 and 43, as to the documents which are to be open to public inspection. Upon the whole, I am of opinion that the second branch of this rule should not be granted. I do not say that the Court has not power under any circumstances to allow inspection of the rejected ballot papers and the counterfoils of ballot papers; but I think, before such inspection is allowed, a very strong primâ facie case should be made out. It is enough for the present purpose to say that no ground has been laid for it here under rules 40 and 41. To shew the bona fides of the application, the petitioner might have given notice, as to certain of the persons whose votes he has objected to, that he did not know whether they had voted or not, and therefore required to see the rejected ballot papers in order to ascertain the fact. I do not say that that would have been sufficient; but, at all events, it would have admitted of very different considerations. It is not even sworn here that any of the persons objected to did in fact vote. I am of opinion, therefore, that no case has been made out for the inspection of the rejected ballot papers or the counterfoils applicable thereto. The hardship on the petitioner is not very considerable. It is possible he may come to the trial prepared with evidence as to persons who did not vote, but they would form but a fraction of the whole. And, when we consider that the judge at the trial may look at all the documents, that hardship is in fact reduced to an almost infinitesimal degree. I regret that I cannot concur with my Brother Brett as to this part of the rule: but I think it should be limited to an inspection of the marked register.

DENMAN, J. The original motion was for a mandamus to the clerk of the Crown, directing him to exhibit to the petitioner or his agent the marked register of voters, the counterfoils of the ballot papers, and the rejected ballot papers. Upon the argument, however, it resolved itself into an application for a rule or order of the Court for that purpose, which is the proper mode of proceeding. Now, with respect to the "marked register," I agree with the rest of the Court that we have power to order production and inspection, and that it is not an unreasonable request on the part of the petitioner. But as to the "counterfoils" and "rejected ballot papers," I have come to the conclusion, though not without great doubt, that we ought not upon this occasion to grant such inspection. The question depends very much upon rule 40. Whether in this case any ground is laid for asking for inspection of these documents depends upon the meaning of the words in s. 40, "required for the purpose of a petition questioning a return." It is not enough that inspection is asked for; the Court must be satisfied by evidence on oath that it is reasonably and bonâ fide required for that purpose. The grounds alleged for requiring it must be looked at. Now, it seems to me not only that it is not affirmatively made out that the inspection asked for is really required for the purposes of this petition, but that what is now asked for is a mere afterthought; at all events, I think that when the Court has granted that which the petitioner originally asked for, viz. the marked register, he has got all that he is entitled to. The petition does not allege that any ballot papers were improperly rejected.

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BRETT, J. The rule will be, that the clerk of the Crown in Chancery be at liberty to open the sealed packet which is alleged to contain the marked register of voters at the Petersfield election, and permit the petitioner and respondent respectively, or their agents, to inspect such marked register, and take copies thereof, if required, on paying for the same; and that the clerk of the Crown in Chancery do not permit any other papers than the said marked register to be inspected.

Rule accordingly.

Agent for petitioner: *F. L. Soames, for J. Soames, Petersfield.*

Agents for respondent: *Rogerson & Ford, for Albery & Lucas, Midhurst.*

April 27.

HENDRICKS *v.* THE AUSTRALASIAN INSURANCE COMPANY.

Marine Insurance—Construction of Policy—" To pay Losses on Dutch Terms" —Foreign Statement of Average.

Post 595, 602, 605

Sugars were insured from Java to Holland by an English policy which contained this clause, " To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt:' to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland."

There was already a policy effected in Holland on the same goods; but of this the English underwriters had no notice, except so far as it could be implied from the above words.

On her voyage to Holland the vessel took the ground under circumstances which would amount to a stranding according to English, but not according to Dutch, law; and a Dutch average stater (a particular average loss having been incurred) made up a statement of average, which statement it was admitted was properly made up according to the facts and according to the law of Holland:—

Held, that the terms of the policy sued on did not amount to notice to the defendants of an existing Dutch policy, and therefore it was to be construed as if it stood alone, and according to English law: But

Held, that, by the latter words of the clause, the defendants were bound to pay according to the foreign average statement, and consequently that the plaintiff was entitled to recover.

THIS was an action brought by the plaintiff against the defendants to recover 503*l.*, the amount of a particular average loss alleged to have been sustained by the plaintiff as owner of a cargo of sugar on board the British ship *Perpetua*. The following case was stated without pleadings.

Followed in Mavro v Ocean Marine Insurance Co
post p. 595.

1. The plaintiff is a merchant carrying on business at Amsterdam. The defendants are a company carrying on business as underwriters in London.

2. On the 1st of March, 1870, the plaintiff, under the name of A. Hendricks & Co., effected with the defendants a policy of insurance upon sugars the cargo of the British ship *Perpetua*.

3. In that policy the insured voyage was described as follows:—"Lost or not lost, at or from any port or ports and [or] places in Java and [or] Sumatra, in any rotation backwards and forwards and forwards and backwards to the vessels, port, or ports of discharge in Holland;" and the subject-matter insured and the risks insured against were described as follows:—"The said ship &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and the said company in this policy are and shall be rated and valued at 2000*l.* on 6715 bags sugar, being in twenty-two series of 300 bags each and one of 115 bags, valued at 4000*l.* To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt.' To pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland; being warranted free from particular average unless amounting to 10 per cent. on each series." The risk so described as hereinbefore stated, except as to the words commencing with "To pay" and ending with "series," is a risk well known among English underwriters as a P. A. risk only. The term P. A. only means that the insurance is to cover only the risks excepted from what is called an F. P. A. policy. The term F. P. A. means that the insurance contains an exception in the following terms:—"Warranted free from particular average unless stranded, sunk, or burnt." A "P. A. risk" only, with the addition of "Dutch terms," or an exception of average under 10 per cent., is not a usual insurance.

4. Previously to the making of the before-mentioned policy, the plaintiff had effected a policy of insurance upon the same cargo with Dutch underwriters in Amsterdam. (1)

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(1) This policy contained the following clause,—"Free of damage and general average under 3 per cent., and free from particular average according to custom on the Exchange."

5. At the time when the defendants executed the policy now sued upon, they knew that the goods had already been insured; but they had no notice where the previous insurance was effected or what were its terms, unless the Court should be of opinion that the policy now sued upon amounted to such notice.

6. On the 6th of January, 1870, the *Perpetua* sailed on the insured voyage from Probolingo, in Java, bound for Amsterdam; and, while descending the river, about midnight of the 11th of January, 1870, took the ground at Oosthook, near the mouth of the river.

7. [Here followed an extract from a protest made by the master at Sourabaya describing the means used to get the ship off.]

8. The ship, having been got off in the manner described in the last paragraph, sailed for Sourabaya. The cargo was there discharged, and the repairs to the hull of the ship rendered necessary by her taking the ground at Oosthook were effected. The cargo was then reloaded, and about the end of March, 1870, the ship sailed for Amsterdam, where she arrived in due course and delivered her cargo.

9. The sugars on being unshipped at Amsterdam were found to have received damage from the ship having taken the ground at Oosthook; and thereupon the owners of the *Perpetua* and the plaintiff, as owner of the cargo, made an application to Dr. James Wertheim to draw up a statement of average. Dr. Wertheim is an official dispacheur at Amsterdam, that is, an average adjuster appointed to prepare average statements by the Association of Underwriters and Ship-owners at the Exchange at Amsterdam.

10. In pursuance of the before-mentioned application, Dr. Wertheim prepared, amongst other things, and signed, a statement dated the 28th of March, 1871, of particular average, shewing a sum of 503*l.* as payable by the defendants to the plaintiff under the policy now sued upon. A copy of this statement was inserted in the appendix to the case, and was to be referred to as part thereof. The figures upon which the adjustment was made were to be taken for the purposes of this case to be correct. (1)

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(1) Dr. Wertheim's statement concluded as follows:—"Considering that the sugar was insured free from particular average according to Amsterdam Exchange conditions, and that risk covered by the English insurance:

11. By the expression "series" in the policy sued upon was meant the packages in which the sugars were packed. The loss amounted to or exceeded 10 per cent. on each series upon which a loss had been adjusted in the statement so prepared by Dr. Wertheim.

12. At Amsterdam and Rotterdam there are regulations in force as between underwriters and ship-owners. These regulations are made by the Association of Underwriters and Ship-owners in each of those towns, and are altered from time to time. These regulations are recognised by the Dutch law as binding, in the sense that they are taken to be imported into every policy of insurance made at Amsterdam and Rotterdam respectively, unless the terms of the policy exclude them.

13. The regulations of Amsterdam at the time of the making of the policies hereinbefore mentioned contained, and still do contain, provisions as to particular average of which the following is a translation:—

"In insurances contracted with the condition 'free from particular average,' the insurer has to indemnify the damage that has occurred only when the vessel has suffered shipwreck, the ship and cargo or the cargo alone has taken fire, or in case of stranding provided that such damage amounts to 10 per cent. or more.

"By stranding is understood that a ship, having got aground, remains fixed, and can be got off only by extraordinary measures. In the sense of this clause are regarded as extraordinary measures the cutting of masts, the heaving overboard or landing of the cargo, &c.: and as ordinary measures, the winding on the anchors or on the shore, the working with the sails, and the like."

The regulations of Rotterdam contain provisions identical with these, except that for 10 per cent. is substituted 3 per cent. It was agreed that, according to the regulations, assuming them to be applicable to the policy now sued upon,—which the defendants denied,—the ship had not under the circumstances stated in this case stranded.

considering that the aforestated damage, however the ship stranded but was floated by no extraordinary measures, cannot be claimed from the Dutch underwriters, the insured is entitled to recover the said damage under the English policies."

14. At the time of the making of the policy now sued upon, and at the time of the commencement of the risk, and until and at the time of the happening of the loss described in this case, the plaintiff was interested in the sugars to the amount of the valuation in and of the sum insured by the policy.

15. It is well known among underwriters that the adjustment of particular average in Holland is more favorable to underwriters than an adjustment in England.

16. The Court were to be at liberty to draw inferences of fact.

The question for the opinion of the Court was whether the plaintiff was entitled to recover in this action. If the Court should be of opinion that he was, judgment was to be entered for the plaintiff for 503*l.* together with such interest thereon as the Court might direct, and costs. If the Court should be of opinion in the negative, then judgment of nol-pros. was to be entered for the defendants, with costs.

Butt, Q.C. (*Cohen, Q.C.,* and *Witt* with him), for the plaintiff contended that the terms of the policy sued on gave the defendants notice that the risks intended to be covered by it were risks excepted out of a Dutch and not of an English policy; that the words "to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland," meant that the defendants should pay all such claims and losses as would be payable by the underwriters according to the law and regulations recognised and observed as between them and the assured in that country; and that, an average statement having been made by an official dispacheur in Holland, and admitted to have been correctly made according to the law of Holland, such statement was binding and conclusive upon the parties both in principle and detail, and not open to question here. The cases of *Harris* v. *Scaramanga* (1) and *Stewart* v. *West India and Pacific Steamship Co.* (2) were cited.

Watkin Williams, Q.C. (*J. C. Mathew* with him), for the defendants, contended that the loss in question was not a loss within the terms of the policy sued on; that the policy, being an English one, was to be construed according to the law of this country, and according to that law there was a stranding; that the clause as to payment according to Dutch terms did not import Dutch law into the contract, and was not to be construed as extending the defendant's liability to a risk already excepted from the policy; that the adjustment contemplated by the policy was a mere mode of adjustment of admitted losses; and that the terms of the policy sued on gave the defendants no notice that the goods were already insured by a Dutch policy.

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(1) Law Rep. 7 C. P. 481.

(2) Law Rep. 8 Q. B. 88, 362.

LORD COLERIDGE, C.J. I am of opinion that the plaintiff is entitled to our judgment. The question is whether the defendants are bound to pay a particular average loss upon an insurance effected with them in these terms:—"To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt.' To pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland; being warranted free from particular average unless amounting to 10 per cent. on each series." I agree with Mr. Watkin Williams that this policy is to be construed as if it had stood alone. Whether the words do or do not imply the existence of another policy effected on the same goods is quite immaterial; such other policy, if there be one, not being so incorporated into the policy sued on as to affect this contract. If the words had stopped at "stranded, sunk, or burnt," no doubt the argument urged by Mr. Watkin Williams must have prevailed: the policy then would have covered only the risks excepted by the well-known clause in English policies; and the only claim the assured would have had would have been particular average where there had been a stranding, sinking, or burning. But the words which follow,—"To pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland,"—would have no meaning unless they are incorporated with and govern the interpretation of the earlier words. It seems to me that the whole of the sentence must be read together. The contract being that the particular average shall be stated in a certain way, viz. by an official dispacheur in Holland, the claims and losses to be paid under it are claims and losses which are to be considered as accruing and to be paid for according to Dutch law as applicable to the foregoing clause. The meaning is, that, if the vessel is stranded, sunk, or burnt, and according to Dutch law a claim for particular average arises, that claim is to be made up by a foreign average-stater, who would of course be governed in his consideration of the claim only by the law with which he was familiar, viz. the Dutch law. That being the true and only construction of this passage in the policy, the case finds that a particular average statement was made up by an official dispacheur, and properly made up according to the Dutch law, and that a claim arose and a loss was sustained which according to the Dutch law the assured were bound to satisfy. So the matter would in my judgment have stood if this had been the first case in which this question had to be considered. But it is not the first case. The question appears to me to be concluded by the two cases which have been relied upon by the plaintiff, viz. *Harris* v. *Scaramanga* (1) and *Stewart* v. *West India and Pacific Steamship Co.* (2) In the former case the underwriters had agreed "to pay general average as per foreign statement, if so made up." It does not become me to say that the ingenuity exhibited in the argument of that case was thrown away: but I own I should have thought those words even clearer than the words here. The assured were to pay average as per foreign statement, if made up: and it was made up. The argument there was that there was no general average loss at all; that the object of the memorandum was, not to add to or extend the risks which the insurers agreed to take upon themselves under the policy, but a mere provision that, if there be a general average loss arising from a peril insured against, the underwriters will pay it according to the foreign average statement, if made,—the underwriters agreeing to adopt the foreign law as to the statement of average, but only to pay general average when occasioned by the happening by a peril insured against according to the English law. But the Court held (3), that, "upon such a policy English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound although the contributions are apportioned between the different interests in a manner

(1) Law Rep. 7 C. P. 481.

(2) Law Rep. 8 Q. B. 88, 362.

(3) Law Rep. 7 C. P. at p. 495.

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different from the English mode, or though matters are brought into or omitted from general average which would not be so treated in England." That case came under the consideration of the Court of Queen's Bench in *Stewart* v. *West India and Pacific Steamship Co.* (1), in which the question was whether under a bill of lading by which it was agreed that average, if any, was to be adjusted according to "British custom," the plaintiffs were entitled to recover in respect of what was according to the general law of England the subject of general average contribution, but which by the admitted *practice* of British average staters was *not* a general average loss. On the part of the plaintiffs it was contended that the clause in question referred to the mode of statement as to the proportion to which ship and cargo are to contribute, which varies in different countries, and not to a custom erroneous in law, as distinguished from law. On the other hand, it was insisted that, whatever the practice of average staters in England, if the parties have agreed to it they are bound by it. The Court held, that, assuming the plaintiffs would have been entitled to recover if the question had depended wholly on the common law applicable to general average losses, as the parties had agreed to make the custom a part of their contract, the case must be decided in accordance with that custom; and they gave judgment for the defendants. When the case came under the consideration of the Exchequer Chamber (2), the decision of that Court was that, whether the Queen's Bench were right or not in saying that the law and practice differed, the parties had agreed to be bound by the British practice. It seems to me that those two cases are not distinguishable in principle from the present. For these reasons, I am of opinion that there should be judgment for the plaintiff.

BRETT, J. The question is whether the plaintiff is entitled to recover a particular average loss on certain sugars. It was argued on the part of the plaintiff that the special case disclosed that there had been two policies, of which the policy sued on was one, and that, upon the face of it, it was intended to cover all risks not covered by the other policy, which was a Dutch and not an

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(1) Law Rep. 8 Q. B. 88, 362.

(2) Law Rep. 8 Q. B. 362.

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English policy; and that, assuming that this policy was to be construed as if no other policy existed, and that the risks covered by it were only those excepted by an ordinary English policy, yet that the risk was enlarged by the subsequent words, "to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland." For the defendants it was insisted that the policy sued on must be construed as if no other policy existed, that the risks insured against were only those left uncovered by the words "warranted free from particular average unless the vessel be stranded, sunk, or burnt," which were to be construed according to English law, and that the subsequent words, "to pay, &c.," did not alter the construction of the contract, but referred only to the mode of ascertaining the amount of loss. I am of opinion that, as the policy declared on does not refer to or incorporate any other policy, it is to be construed as if there had been no other policy in existence. Then, the policy in question is to cover the risks excepted by the clause "warranted free from particular average unless the vessel be stranded, sunk, or burnt." The policy, if it had ended there, would have received a construction in accordance with the recognised rules of construction of an English policy; and, as there was no stranding, there was no loss within the terms of the policy. But some effect must be given to the words which follow, "to pay all claims and losses on Dutch terms." I do not think these words apply to any claim or any loss, but to a claim made or a loss incurred for particular average where the ship is stranded, sunk, or burnt; and that is to be ascertained according to a statement to be made up by a Dutch average stater, according to Dutch terms, that is, Dutch law. That being so, a Dutch average stater, if he had to determine the matter, or an English Court if there was no average statement, would have to inquire what is a stranding according to Dutch law. If the clause had stopped at the first words, there would have been no necessity for an average statement at all. But the application of the English law is made subject to a condition, that a claim for an average loss shall only be enforced according to a statement made up by an average stater in Holland. The natural inference would be that the Dutch average stater would do that according to the only law with which he was acquainted, viz. Dutch law. I am

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therefore of opinion that the plaintiff is entitled to recover. I agree with my Lord that the case is governed by *Harris* v. *Scaramanga* (1) and *Stewart* v. *West India and Pacific Steamship Co.* (2) In accordance with the principle laid down in those two cases, it seems to me that, although there has been a stranding according to English law, yet, inasmuch as a statement has been made up by the foreign average stater for a particular average as if there had been no stranding, it being admitted that he has acted rightly according to Dutch law, the loss is brought within the risk intended to be covered by the policy, and therefore both upon authority and upon the true construction of the policy itself the plaintiff is entitled to recover.

DENMAN, J. I am of the same opinion. I agree that we are to construe the policy sued on according to English law, and without reference to the Dutch policy. What, then, is the true meaning of the policy? The words are, "To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt;' to pay all claims and losses on Dutch terms, and according to statement made up by official dispacheur in Holland." Taking the whole clause together, I entertain no doubt that its meaning is, that the policy is to be construed according to Dutch law, and that "stranded" means stranded according to Dutch law. And, the average statement having been correctly made up according to the facts and according to the law of Holland, there is nothing to prevent the plaintiff from recovering.

Judgment for the plaintiff.

Cohen, Q.C., asked for interest from the date of the average statement, the 24th of March, 1871. But the Court said it would hardly be fair to allow interest for the time the case had stood in the paper, and accordingly limited it to two years' interest.

Attorneys for plaintiff: *Pritchard & Sons.*
Attorneys for defendants: *Waltons, Bubb, & Waltons.*

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(1) Law Rep. 7 C. P. 481.

(2) Law Rep. 8 Q. B. 88, 362.

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May 10.

COLE AND ANOTHER *v.* THE NORTH WESTERN BANK.

Factors Acts—Agent "intrusted with the Possession of Goods," within 5 & 6 *Vict. c.* 39*—Agent a Warehousekeeper as well as a Broker.*

2 CPD 228
237-9
5 App Cas
677-8-9

To constitute a person "an agent intrusted with the possession of goods," within the Factors Acts, he must be intrusted with them in the character of such agent, that is, for the purpose of sale. If, besides the character of agent, he also carries on an independent business as a warehousekeeper, goods intrusted to him for the purpose of warehousing them are not "intrusted" to him as agent within the meaning of the Acts.

One Slee carried on the business of a wool-broker at Liverpool, and also that of a warehouse keeper. In this latter capacity he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for wools, with directions to warehouse them and await instructions as to the disposal of them. These wools consisted of both sheep's and goats' wool. Slee was not a goats' wool broker; and, as to the sheep's wool, he sold it only under specific instructions sent to him by the plaintiffs in respect of each transaction.

Having wools of the plaintiffs' of both descriptions in his warehouses (but not having received any specific instructions to sell either), Slee pledged both with the defendants, bankers, for a loan, giving them a letter undertaking to hold the wools as trustee for them:—

Held, that Slee was not "an agent intrusted with the possession" of the wools, within the true meaning of the Factors Acts.

Affirmed in Ex Ch LR 10 CP 354

THIS was an action brought to determine the right, as between the plaintiffs and the defendants to the various parcels of wool hereinafter mentioned. The following case was stated for the opinion of the Court:—

1. The plaintiffs are merchants carrying on business in London under the style of W. H. Cole & Co. The defendants are bankers at Liverpool.

2. Edwin Slee up to the time of his becoming bankrupt as hereinafter mentioned carried on business as a wool-broker at Liverpool. He did not in the ordinary course of his business receive consignments of wool for sale. He also had three warehouses,—one at 17, Temple Street, Liverpool, known as "Bell & Grant's Warehouse;" one at 25, Temple Street; and another in Luton Street, Liverpool, known as "Joynson's Warehouse."

The plaintiffs are large importers of wool, and at Liverpool were in the habit of warehousing their wools in the warehouses belonging to Slee, under the circumstances hereinafter mentioned, and paying warehouse-rent in respect thereof. These wools con-

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sisted of two classes,—sheep's wool and goats' wool. Slee usually sold the sheep's wool under specific instructions from the plaintiffs, according to the course of business hereinafter appearing. But their goats' wool was never sold by them through Slee, he not being a goats' wool-broker.

4. The course of business between the plaintiffs and Slee was as follows:—Shortly before the arrival of a ship in Liverpool bringing wool belonging to the plaintiffs, whether sheep's wool or goats' wool, they sent down the bill of lading to Slee for the purpose of his receiving the wool from the ship, and warehousing it. Slee, after the wool had been so received and warehoused, sent up to the plaintiffs a report and valuation thereon, and then awaited their further instructions as to disposal.

5. As the plaintiffs effected sales of the goats' wool, deliveries were made by Slee to the buyers; the plaintiffs paying Slee the warehouse-rent in respect thereof. As to the sheep's wool Slee had no general authority from the plaintiffs to sell; but always awaited instructions, and acted only under specific authority given to him from time to time in each case; and, when such last-mentioned sales were effected, Slee received the proceeds and rendered account-sales to the plaintiffs in the ordinary way, charging them the warehouse-rent, and accounting to them for the net proceeds.

6. On the days stated in the schedule set out below, the plaintiffs sent to Slee the bills of lading of wool therein specified. The entries in the various columns correctly shew, in addition to the dates when the bills of lading were received by Slee, when the wools mentioned in those bills arrived at Liverpool, when they were received by him, and where they were warehoused:—

No. of bales.	Ship's name.	Description of wool.	Bills of lading.		Ship's arrival at Liverpool.	Receipt of wool from ship.	Wool warehoused.	
			Sent by plaintiffs.	Received by Slee.			Date.	Where.
			1872	1872	1872	1872	1872	
88	*Albanian*	Mohair .	12 March	13 March	26 March	2 April	2 April	Luton St.
58	*Bavarian*	Egyptian	13 „	14 „	27 „	„ „	„ „	17 Temple Street.
68	*Hecla* .	Mohair .	25 „	26 „	3 April	5 „	5 „	Luton St.
114	*Grecian* .	Egyptian	2 April	3 April	6 „	9 „	9 „	17 Temple Street.

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7. All the wools mentioned in the above schedule (except 20 out of the 68 bales ex *Hecla*, as to which 20 no question arises) remained in the places where they were warehoused until after the commencement of this action. The parcel of 114 bales ex *Grecian* was not received by Slee until after the letter of the 5th of April, 1872, hereinafter set out.

8. Of the wools specified, the two parcels of Mohair (88 ex *Albanian* and 68 ex *Hecla*) are goats' wool, and the remainder are sheep's wool.

9. The defendants claim to be entitled to the said wools (except the 20 out of the 68 bales per *Hecla*) as being the four parcels lastly described in the letter of the 5th of April, 1872. Upon the other parcels of wool comprised in this letter no question arises in this action.

10. On the 5th of April, 1872, Slee obtained from the defendants an advance of 7000*l.*, giving them a letter of which the following is a copy :—

"Liverpool, 5th April, 1872.

"To the North Western Bank, Limited,

"In consideration of your advancing to me against bills to be got hereafter for the sum of 7000*l.*, say, seven thousand pounds, for two months, I agree to hold the produce hereunder specified as trustee for you and as security for the said advance (with interest and commission), and to sell the same under your orders, and pay to you the proceeds thereof as and when received, in or towards repayment of the said advance. And I further agree that I will, whenever you request me so to do, deliver the produce to you to enable you to sell the same and to apply the proceeds to the payment of the said advance. The property is fully insured by floating policies with the Royal for the sum of £——, the policy for which I hold for your behalf.

(signed) "Edwin Slee.

Marks.	Description.	Classification.	Value.
			£
T. K.	155 bales ex *Hecla*	Kassapaslu wool .	1600
	55 ,, ,,	Albanian wool .	500
F. N. A.	58 ,, ,,	Egyptian wool .	1200
S. G.	88 bags ,,	Mohair. . . .	1760
	48 ,, ,,	,, ...	1000
F. N. A.	44 bales ,,	Egyptian wool .	1900
			£7960

"Warrants for which I can lodge to-morrow."

11. No warrants or other documents of title in respect of any of the goods comprised in this letter were handed to the defendants

at the time or subsequently; but Slee promised to hand them dock-warrants for the same next morning, and upon that promise the defendants then gave him 7000*l.* in cash, which was used by him in the usual course of his business.

On the morning of Saturday, the 6th of April, Mr. Archibald, one of the defendants' clerks, was sent by them to Slee's office with the above letter, and saw Slee, and asked him for the warrants mentioned at the foot of the letter or for possession of the wools. Slee excused himself on the ground of being very busy, and said he would attend to the matter. On Monday the 8th and Tuesday the 9th Slee was pressed for the warrants and delivery of the wool; and on the 10th Mr. Archibald went to Slee's office in order to obtain the warrants, and was informed that Slee was out of town, but would be back next day, and it would be all right.

12. The defendants through their officers made various applications to Slee for the warrants referred to in the letter of the 5th of April, 1872, and continued to press him for the same until he absconded in consequence of such pressure. On Wednesday, the 10th of April, 1872, the defendants sent a clerk (Mr. Archibald) for the warrants, when he was informed by Mr. Meikle, Slee's cashier, that Slee was out of town, but would be back the next day. That day Slee absconded with intent to defeat and delay his creditors; and nothing further has been heard of him, except as stated in the next paragraph.

13. On the next day a telegram was received at Slee's office, purporting to come from him, from the Derby railway station, of which the following is a copy:—"I am coming home now. I have got 7000*l.* for the bank. Let Meikle tell Archibald. I expect to be in Liverpool at ten to-night." Slee never came home as stated in this telegram; nor was anything further heard from him. Mr. Meikle, his cashier, took this telegram to the bank and shewed it to the manager and also to Mr. Archibald. The following morning, Friday, the 12th of April, 1872, Mr. Archibald again went, in pursuance of his former instructions, to Slee's office, and found that he had not returned, and upon inquiry was informed that the bulk of the wool mentioned in the letter of the 5th of April was in the warehouse No. 17, Temple Street. He went there with W. H. Slee, a brother of Edwin Slee,

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who was in the latter's employ as a clerk, and examined the parcels of wool stored there, and ascertained that the bulk of the wool referred to in the letter of the 5th of April was lying there: and he was assured by W. H. Slee that the remainder of the said wool was in Slee's warehouse in Luton Street.

14. On Saturday, the 13th of April, 1872, the defendants again sent for W. H. Slee, who on attending the bank saw Mr. Moss, one of the directors, Mr. Edmonson, the manager, and Mr. James, the sub-manager, and was questioned by them as to Edwin Slee's private life; and, after W. H. Slee had told all he knew, Mr. Moss inquired how it was he (W. H. Slee) knew so little about his brother's financial arrangements. W. H. Slee replied that he was merely a clerk in the office, and that, beyond the sample-room business and the shipping department, he knew nothing. Mr. Arnold, the chairman of the defendants' bank, then sent word for W. H. Slee to come into his (Mr. Arnold's) room. W. H. Slee went there accompanied by Mr. Moss, Mr. Edmonson, and Mr. James; and, after similar questions to those put by Mr. Moss, Mr. Arnold produced to W. H. Slee the letter of the 5th of April, 1872, before set out, and demanded from W. H. Slee the keys of the warehouses in which the wools were stored. W. H. Slee told him he had no right to deliver up the keys to anybody. Mr. Arnold then asked him to read the letter of hypothecation, which W. H. Slee did; and Mr. Arnold pointed to the clause agreeing to deliver the goods to the bank when they required it. W. H. Slee said he did not know what to do. Mr. Arnold then asked, did he mean to give up the keys or not? Slee replied "Certainly not;" upon which Mr. Arnold said, if the keys were not given up, the police would be communicated with, and he would have him taken into custody. W. H. Slee asked if they would allow Mr. Archibald to accompany him to Mr. Ragg, his brother's salesman, with the letter of hypothecation, and he would take Mr. Ragg's advice, and act accordingly. Mr. Archibald accompanied W. H. Slee to Edwin Slee's office; and in his (Mr. Archibald's) presence, W. H. Slee told Mr. Ragg that the defendants demanded the keys of the warehouses in which the wools were stored, and asked him what should be done, as Mr. Arnold threatened to have him taken into custody if he would not give

them up; and Mr. Ragg said: "We shall just have to do what the bank wants;" whereupon the keys of the Luton Street warehouses were delivered over to Mr. Archibald; and shortly afterwards, on the same day, the keys of the Temple Street warehouse were, at the request of Mr. Archibald, delivered to him by the direction of Ragg. Neither W. H. Slee, Mr. Ragg, nor any one else on Slee's behalf, had any authority to hand over such keys to the defendants. But the defendants, having so obtained possession of them, took and kept possession of the warehouses until after the wools the subject of this action were sold by arrangement, as hereinafter mentioned.

15. On Monday, the 15th of April, 1872, Mr. Edmonson, the defendants' manager, sent over to Slee's office for Mr. Ragg; upon which the latter went to the bank, when, in the course of conversation, Mr. Edmonson stated that Slee had committed an act of bankruptcy, but of course they (the bank) should not think of taking any steps. On the evening of Wednesday, the 17th of April, Mr. Ragg was again at the bank, when he was informed that the defendants had decided to remove the wools. He begged Mr. Edmonson not to do anything of the kind, and to give him time to communicate with the merchants; to which Mr. Edmonson replied they had nothing to do with any merchants, but only with Mr. Slee. On the following Thursday, the 18th of April, men employed by the defendants commenced removing certain wools from the warehouses; upon which Mr. Ragg immediately went to the bank and saw Mr. Edmonson, and told him he was surprised they should remove the wools without obtaining a delivery order from Mr. Slee's recognised warehouseman; at the same time stating that the men could not tell anything about the various wools, and that there were many lots there which had certainly not been hypothecated. Mr. Edmonson declined to recognise any order from Mr. Ragg, and stated they should continue taking delivery; and they did accordingly take such delivery, and by virtue thereof retained the wools in question until the sale thereof hereinafter mentioned. Mr. Ragg upon this communicated with some of Slee's creditors. A petition for adjudication of bankruptcy was presented the next morning, the 19th, upon which Slee was in due course adjudicated bankrupt.

16. Before the 10th of April, and before receiving any intimation of the defendants' making any claim to or having obtained possession of the wools in question, the plaintiffs had through their London wool-brokers effected (subject to approval of quality) a sale of the 88 bales mohair wool ex *Albanian* and 68 bales of mohair wool ex *Hecla.*

17. On the 20th of April, the following notice was served on the registrars of the county court of Lancashire at Liverpool, and the defendants, under the circumstances hereinafter stated:—

"To the registrars of the county court of Lancashire at Liverpool, and the North Western Bank, Limited.

"In the matter of Edwin Slee, of Liverpool, wool-broker, a bankrupt.

"We, the undersigned, W. H. Cole & Co., of 85, Gracechurch Street, London, hereby give you and each of you notice that we are the owners of the undermentioned lots of wool, which had been consigned by us to the bankrupt for sale; and we hereby demand the delivery of the same forthwith, and will hold you respectively responsible in case you or any of you fail to comply with this demand. Dated this 20th of April, 1872.

[Here followed an enumeration of the wools ex *Bavarian, Grecian, Hecla,* and *Albanian,* with marks and numbers, warehoused respectively at 17, Temple Street, and Luton Street.]

"Per pro W. H. Cole & Co.,
"B. D. Tabor."

The wools mentioned in this notice are the wools described in the schedule to paragraph 6 of the case, with the exception of 20 out of the 68 bales ex *Hecla*, mentioned in that schedule.

Tabor, a clerk of the plaintiffs, on the plaintiffs hearing that Slee had absconded, was sent down by them to Liverpool for the purpose of ascertaining how matters stood in regard to the parcels of wool warehoused with Slee under the circumstances above mentioned; and, having ascertained that the wools specified were obtained by the defendants under an alleged hypothecation from him to them, consulted Mr. Wilson, a solicitor of Liverpool, who advised a notice of the wools being the property of the plaintiffs being at once given to the Bankruptcy Court and to the defendants, which Tabor desired him to prepare accordingly; and the above notice was accordingly prepared by Mr. Wilson in great haste, and signed by Tabor without his noticing the statement as to the wools being consigned to Slee for sale.

The statement that such wools were consigned to Slee for sale was incorrect.

The only notice which Tabor instructed Mr. Wilson to prepare was a notice that the wools were the property of the plaintiffs; nor had he authority to sign any other.

18. The wools specified in paragraph 6 (except the 20 bales not in question out of the 68 ex *Hecla*) were duly demanded on behalf of the plaintiffs from the defendants, who declined to give them up; and, after the commencement of this action, they were sold under the following agreement, signed by the respective attorneys:—

"It is hereby agreed, with a view to avoid further loss arising from delay in the sale and realisation of the undermentioned wools, the subject of this action, that the said wools shall, without prejudice to any question between the parties, be sold by Mr. Haigh, of Liverpool, wool-broker, under the instructions of and at such limits as to price as shall be given to him by Messrs. W. H. Cole & Co., with the concurrence of the North Western Bank, and the net proceeds arising from such sale paid by him into the London Joint Stock Bank, London, to a deposit account, at interest, in the joint names of H. H. Baxter and A. Edmondson, to abide the result of this action, and to the extent to which the plaintiffs shall be held entitled to recover therein paid over to them, and, subject thereto, to be received by the defendants. Dated the 3rd of October, 1872." [Here followed particulars of the wools.]

19. The sale realised 5249*l.* 1*s.* 6*d.*, which was 1412*l.* 0*s.* 1*d.* less than the market value of the wools at the date when they were first demanded by the plaintiffs and detained by the defendants; and out of such 5249*l.* 1*s.* 6*d.* the sum of 57*l.* 17*s.* 8*d.* had to be paid for warehouse-rent during the time they were so detained by the defendants,—reducing the amount to 5191*l.* 3*s.* 10*d.*, less 1*l.* 7*s.* bank commission, as the net proceeds of sale paid into the London Joint Stock Bank under the before-mentioned agreement.

20. The plaintiffs claim to recover the said sums of 5191*l.* 3*s.* 10*d.*,

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57*l.* 17*s.* 8*d.*, and 1412*l.* 0*s.* 1*d.*, in all 6661*l.* 1*s.* 7*d.*, together with interest on the last-mentioned sum at the rate of 5 per cent. per annum from the 20th of April, 1872, by way of further damages.

21. The following statement shews the amount realised by the sale, the warehouse-rent, and the depreciation in market value in respect of each parcel :—

Particulars of wools.	Proceeds of sale.			Warehouse rent.			Paid into the bank.			Depreciation by detention.		
	£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
88 bales ex *Albanian*	1709	4	1	18	11	11	1690	12	2	149	11	11
48 „ *Hecla* .	735	6	11	9	18	0	725	8	11	84	8	5
58 „ *Bavarian*	651	12	11	10	3	0	641	9	11	407	17	7
114 „ *Grecian* .	2152	17	7	19	4	9	2133	12	10	770	3	2
	5240	1	6	57	17	8	5191	3	10			
	Less bank commission.						1	7	0			
							5189	16	10	1412	0	1

The question for the opinion of the Court was, whether the plaintiffs were entitled to maintain this action for any of the matters above stated.

If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiffs for such of the above sums as the Court should direct, with costs. If the Court should be of opinion in the negative, judgment of non-pros. was to be entered for the defendants, with costs. (1)

May 4. *Herschell, Q.C.* (*English Harrison* with him), for the plaintiffs. There are two principal points to be considered :— 1. That Slee was not so intrusted with the wools as to be able to give the defendants a good title under the Factors Acts, at all events as to the goats' wool; and it may be there is a further distinction as to the 114 bales which were not in his possession at the time of the pledge: 2. That, even if he was an agent intrusted with the goods within the Acts, he has not made such a pledge to the defendants as to give them a title.

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(1) The following letters from the plaintiffs to Slee were set out in an Appendix :—

April, 2, 1872. "Inclosed please find bill of lading for F. N. A. 114 bales wool per *Grecian*, of which please take charge for our account, and send us report and valuation as usual, for our instructions as to disposal."

March 12, 1872. "Inclosed please find bill of lading S. G. 76 to 163, 88 bales Mohair per *Albanian*, of which please take charge as usual for our account, sending us report and valuation at your early convenience, following our instructions as regards disposal."

1. Slee carried on business as a wool-broker in Liverpool, and also as a warehousekeeper, in which latter capacity he received wools other than those which were intrusted to him for sale, and for which he merely received warehouse rent. Amongst other wools which he was in the habit of warehousing for the plaintiffs was goats' wool, which he did not deal in as a broker; this was sold by the plaintiffs through another broker. The course of dealing as to both kinds of wool was this,—When wools consigned to the plaintiffs were about to arrive at Liverpool, the bills of lading were sent to Slee in order that he might receive them into one of his warehouses. So far he only acted as a warehousekeeper; and, when he sold the other wools, it was only pursuant to specific instructions given to him from time to time by the plaintiffs. Now, the factor or agent intrusted under the Factors Acts must be a person who is intrusted with the goods for the purpose of, or in connection with, the sale of them; if he carries on an independent business as a warehouseman, and receives the goods in that character only, he cannot give a title under the Factors Acts: that was decided in *Monk* v. *Whittenbury* (1), which has never been departed from, but has been repeatedly recognised and acted upon. By 6 Geo. 4, c. 94, s. 1, it was enacted that "any person or persons intrusted for the purpose of consignment or of sale with any goods, wares, or merchandise, and who shall have shipped such goods, wares, or merchandise in his, her, or their own name or names, and any person or persons in whose name or names any goods, wares, or merchandise shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares, and merchandise to a lien thereon in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares, or merchandise shall be shipped, or in respect of any money or negotiable security or securities received by him, her, or them to the use of such consignee

(1) 2 B. & Ad. 484.

or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares, and merchandise: provided such consignee or consignees shall not have notice by the bill of lading for the delivery of such goods, wares, or merchandise, or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or persons so shipping in his, her, or their own name or names, or in whose name or names any goods, wares, or merchandise shall be shipped by any person or persons, is or are not the actual and bonâ fide owner or owners, proprietor or proprietors of such goods," &c.: *Monk* v. *Whittenbury* (1) was decided upon that Act. In *Phillips* v. *Huth* (2), it was held that the mere possession of the symbols of property in the goods did not give the factor authority to pledge them. Then came 5 & 6 Vict. c. 39, the 1st section of which, after reciting that "advances on the security of goods and merchandise had become an usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to bonâ fide advances upon goods and merchandises as by the recited Act [6 Geo. 4, c. 94] is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should, in all cases where such owners by the recited Act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the security thereof,"—enacts that "any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bonâ fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." And s. 4 enacts that "any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act; and any agent intrusted as aforesaid and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid, and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody or shall be held by any other person subject to his control or for him or on his behalf; and where any loan or advance shall be bonâ fide made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid on the faith of any contract or agreement to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this Act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto." Still it was held that the agent must at the time of the pledge be intrusted with the property or the symbol of property for the purpose of or in connection with the sale of the goods; see the elaborate discussion of the Factors Acts by Willes, J., in *Fuentes* v. *Montis* (1), confirmed by

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(1) 2 B. & Ad. 484.

(2) 6 M. & W. 572.

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(1) Law Rep. 3 C. P. 268.

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the Exchequer Chamber. (1) In the course of the judgment in the Court below, it is said (2): "Not only must the person intrusted be an agent, but he must be an agent for sale; and that would exclude the case of a carrier or warehouseman, who is in some sense an agent and intrusted with the possession of goods. The agents contemplated by the Factors Acts are agents intrusted for sale." In *Baines* v. *Swainson* (3), a person who had by means of a fraud obtained possession of goods was nevertheless allowed to make a valid pledge of them, because, as Crompton, J., said (4), "they were intrusted to him as agent in a mercantile or trade transaction within the rule propounded by Wigram, V.C., in *Wood* v. *Rowcliffe* (5), which is the most satisfactory one to my mind for determining whether a case is within the Factors Acts." Blackburn, J., in the same case says (6): "The facts shew that Emsley carried on a business in which he acted as agent for others, and in the ordinary course of which he would sell goods and receive payment for them. That being so, I think he was an agent within the meaning of 6 Geo. 4, c. 94, which, from the context, and independently of the authorities, must be considered to be confined to agents who are carrying on a business which in the ordinary course would lead to sale. In *Monk* v. *Whittenbury* (7), the goods were not intrusted to such an agent as the Act contemplated, because they had been intrusted to him as a wharfinger, and not as a person by whom the goods were to be sold." The only occasion upon which anything adverse to that has been said is in the case of *Vickers* v. *Hertz* (8), where Lord Westbury says: "Mr. Justice Willes is reported to have said that the factor must be deemed to be a factor for sale. (9) What is stated in the Act is, that a factor who is intrusted with the goods, or with a document of title, shall be authorized to deal with the goods in a particular manner. And then the 4th section goes on to define what is meant by a 'document of title;' and the definition is one which will include these orders. (10) What we have to inquire, therefore, in this case is, whether the factor was intrusted by the owner with a possession of a document of title entitling the factor to give possession of the goods. That undoubtedly he was. If the words of the Act had been 'factor for sale,' I should have been of opinion, undoubtedly, that that meant one who has contracted to sell, but has not completed the sale, but has received from his principal a document of title in order to complete the sale, and who, as the recipient of that order, is an agent for the sale within the meaning of those words. The words 'factor for sale,' however, are not found in the Act; and the question simply is this: were Campbell Brothers intrusted with the possession of a document of title?" As to the goats' wool here there can be no question. Do the facts as to the sheep's wool place that in a different position? Slee had no authority to sell until he received instructions from the plaintiffs; and none were given as to the wools in question. At all events, the plaintiffs must recover in respect of the 114 bales ex *Grecian.* Slee, though he received the bill of lading as to these on the 3rd of April, did not receive the wool into his warehouse until the 9th; and the supposed pledge was on the 5th. He did not purport to pledge that bill of lading at all.

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(1) Law Rep. 4 C. P. 93.

(2) Law Rep. 3 C. P. at p. 279.

(3) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(4) 4 B. & S. at p. 284.

(5) 6 Hare, 183, 191.

(6) 4 B. & S. at pp. 285, 286.

(7) 2 B. & Ad. 484.

(8) Law Rep. 2 Sc. Ap. 113, 118.

(9) Law Rep. *Fuentes* v. *Montis*, 3 C. P. 268, 279.

(10) Delivery orders.

2. The letter of the 5th of April, 1872 (see paragraph 10), does not operate as a pledge of the wools. To constitute a valid pledge under the Factors Acts, there must be a contemporaneous delivery of the goods themselves or of the documents of title. Possession was here improperly obtained from Slee's clerk by means of threats. *Portalis* v. *Tetley* (1) does not affect this case. The dictum of Wood, V.C. (2), that the latter part of s. 4 of 5 & 6 Vict. c. 39, was meant to apply to "the case where the factor, being advised that goods are coming forward to him, agrees that as soon as he gets them, and as soon as the bills of lading come to hand, he will pledge them," was extra-judicial, and not necessary to the decision.

May 10. *Benjamin, Q.C.* (*R. G. Williams, Q.C.*, with him), for the defendants. Slee was in the complete apparent possession of and had complete apparent control over the goods, and had ostensibly authority to sell or to pledge them: *Pickering* v. *Busk.* (3) Lord Ellenborough there says: "Strangers can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." And see *George* v. *Clagett* (1), *Rabone* v. *Williams* (2), and the judgment of Willes, J., in *Semenza* v. *Brinsley.* (3)

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(1) Law Rep. 5 Eq. 140.
(2) Law Rep. 5 Eq. at p. 148.
(3) 15 East, 38.

The first of the Factors Acts was 4 Geo. 4, c. 83. That Act recited that it had been found that the law as it then stood, relating to goods shipped in the names of persons who are not the actual proprietors thereof, and to the deposit or pledge of goods, afforded great facility to fraud, produced frequent litigation, and proved in its effects highly injurious to the interests of commerce in general. The 1st section then proceeded to enact that persons in whose names goods shall be shipped shall be deemed the owners. Sect. 2 allowed a deposit or pledge of the goods or bill of lading, but only to the extent of the right or interest which the consignee himself had. It was soon found that the Act did not go far enough, and accordingly 6 Geo. 4, c. 94, was passed. *Monk* v. *Whittenbury* (4) and *Phillips* v. *Huth* (5) were decided upon that Act. In this latter case it was held that, in order to make the factor a party *intrusted* with the dock-warrant within the meaning of the Act, it must appear that the owner of the goods *intended* that the factor should be possessed of it at the time of the pledge, or that he should exercise the power which the possession of the bill of lading gave him of obtaining the dock-warrants whenever he in his discretion might think fit. It was in consequence of these decisions, and *Hatfield* v. *Phillips* (6), that 5 & 6 Vict. c. 39, was passed. Under that Act, a wharfinger, who is a mere depository or custodian of the goods, is not a person intrusted with them so as to invest him with the character of owner. But, if he is also a person intrusted with the goods as agent, or with the documents of title, he may be dealt with in all respects as if he were the actual owner of the goods, but not so as to be enabled to pledge them for an antecedent debt: s. 3. The Act is confined to mercantile dealings, and does not apply to the case of a person intrusted in the capacity of a clerk or servant: *Lamb* v. *Attenborough.* (1) *Baines* v. *Swainson* (2), when carefully looked at, will be found a strong authority in favor of the defendants.

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(1) 7 T. R. 359.
(2) 7 T. R. 360, n.
(3) 18 C. B. (N.S.) 467; 34 L. J. (C.P.) 161.
11 Jur NS. 409
(4) 2 B. & Ad. 484.
(5) 6 M. & W. 572.
(6) 9 M. & W. 647.

[Lord Coleridge, C.J. All the judges there distinctly uphold *Monk* v. *Whittenbury.* (3) They treat it as an existing authority under the present Act.]

In that case the plaintiff had never sent goods to the wharfinger *for sale.* Here, the plaintiffs had been in the habit of employing Slee in his capacity of broker to sell their wools.

[Lord Coleridge, C.J. Only as to the sheep's wool; and that under specific instructions in each case.]

As to *Fuentes* v. *Montis* (4), the ground of the decision is that the agent when he made the pledge was not intrusted at all: and it was a decision come to with manifest reluctance.

[Brett, J. I find some pointed remarks upon that case and upon the dictum of Lord Westbury in *Vickers* v. *Hertz* (5) in a valuable work by Mr. Benjamin on the Law of Sale of Personal Property, 2nd ed. p. 17.]

Then, was there a valid pledge here? The letter of the 5th of April, it is submitted, was a sufficient pledge of the wools then in Slee's warehouses. It was not necessary that they should be actually handed over. It was enough that Slee agreed to hold them for the defendants. It was a "contract or agreement by way of pledge, lien, or security bonâ fide made" to them, within s. 1 of the Act of 1842. "It was an advance made specifically on account of the goods in question," to use an observation of Erle, C.J., in *Langton* v. *Waring* (6); or, as Willes, J., observes in the same case, "There was a contract between him and the defendants that these particular goods should stand as a security for that sum,"—the advance.

[Lord Coleridge, C.J. The question arose there under a claim in bankruptcy, not under the Factors Acts. Nothing passes to the

8 Jur NS 280

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(1) 1 B. & S. 831; 31 L. J. (Q.B.) 4.

(2) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(3) 2 B. & Ad. 484.

(4) Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93.

(5) Law Rep. 2 Sc. Ap. 113.

(6) 18 C. B. (N.S.) 315, 329.

assignees or trustee but property to which the bankrupt is entitled equitably as well as legally.]

Portalis v. *Tetley* (1) is a distinct authority in favor of this pledge. Wood, V.C., there says (2): "The factor may wish to pledge forthcoming goods which he has not yet actually received, and enters into a contract that, whenever the goods now promised, or the bill of lading, come to hand, the security shall be given. 'Lend me the money now, and I will undertake that that shall be done.' If you do get from the factor the goods which he is expecting before you have notice, you shall be in the same position as any other person. If you get notice before that, in that case you must submit to the consequences, as you have chosen to deal with a thing which was not in hand." So here, when Slee became intrusted, he could make valid the contract he had entered into.

[Lord Coleridge, C.J. The Vice-Chancellor was there extending the equity of the statute to a case which clearly was not within its words. The facts did not require him to hold as he did. And, whether right or wrong, that is not this case.]

If the defendants were entitled to take the goods against Slee's own will, they are not in a worse position by having taken them from his servants. As to the 114 bales ex *Grecian*, though they were not in Slee's actual possession at the time of the pledge, he had the bill of lading, and therefore it was competent to him to make a valid pledge within s. 4.

[Lord Coleridge, C.J. That is where the agent pledges the bill of lading. Here, Slee did not pledge the bill of lading.]

Herschell, Q.C., in reply. The only authority which assumes any considerable proportions is the case in Equity last cited: and that applies only to the second point in this case, which becomes unimportant if the Court is with the plaintiffs upon the first point.

Lord Coleridge, C.J. I am of opinion that the plaintiffs are entitled to judgment on this special case. The plaintiffs are merchants in London, and the defendants bankers at Liverpool. The action arises out of the misconduct of a person named Slee, who was for some purposes the agent of the plaintiffs at Liverpool.

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(1) Law Rep. 5 Eq. 140.

(2) Law Rep. 5 Eq. at p. 149.

Slee, it appeared, carried on two distinct businesses,—that of a woolbroker, and that of a warehousekeeper. The question arises in respect of certain bales of wool. Slee was in the habit of receiving large quantities of wool, both sheep's and goats' wool, to be warehoused for the plaintiffs. Certain letters which accompanied or preceded the arrival of each consignment were very much relied on by the defendants. Of these I will notice only two. On the 13th of March, 1872, the plaintiffs wrote to the defendants,—"Inclosed please find bill of lading for 88 bales mohair per *Albanian*, of which please take charge as usual for our account, sending us report and valuation at your early convenience, and following our instructions as regards disposal." On the 25th they write again,—"Inclosed please find bill of lading for 58 bales wool per *Bavarian*, of which kindly take charge as usual, and send us report and valuation, following our instructions as regards sale or disposal." It is enough to take these two to test the whole matter in dispute. Both descriptions of wool came to Slee to be taken charge of in the same manner, to wait instructions. It is conceded that no question arises as to the goats' wool. Slee never sold goats' wool. Having got these bales of wool into his possession in this way, Slee got into difficulties, and obtained from the defendants 7000*l.* upon an agreement in these terms,—"In consideration of your advancing me against bills to be got hereafter the sum of 7000*l.* for two months, I agree to hold the produce hereunder specified as trustee for you, and as security for the said advance, and to sell the same under your orders, and pay to you the proceeds thereof as and when received, in or towards repayment of the said advance. And I further agree that I will, whenever you request me so to do, deliver the produce to you to enable you to sell the same and to apply the proceeds to the payment of the said advance."

Upon that a question has been raised upon which, as at present advised, I offer no opinion. It is suggested that, whether Slee was or was not a person who could pledge the goods in question, this agreement was not in fact a pledge, because, as to some of them, he was at the time only in possession of the bills of lading, and he did not profess to pledge them; and, as to the rest, which were in his possession, there was no delivery "during the period subsequent thereto" within s. 4 of 5 & 6 Vict. c. 39. Upon that question the case of *Portalis* v. *Tetley* (1) has an important bearing: and, without saying more than that it is a matter deserving of great consideration, I offer no opinion upon it, because I think the first point in the case has not been made out, and therefore the second and subordinate point does not arise.

Now, the first point is this:—It is said on the part of the defendants that Slee had authority under the Factors Acts to pledge these wools to the bank; that he had been clothed with that authority by the plaintiffs; and that, having once clothed him with that authority, the plaintiffs could not withdraw it. Whether that is so or not will depend upon whether or not Slee was, within the words of s. 1 of 5 & 6 Vict. c. 39, an agent "intrusted with the possession of goods, or of the documents of title to goods," so as to be "deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bonâ fide made by any person with such agent so intrusted as aforesaid." That is the question which we have to determine. It was argued that Slee was an agent. That is in a certain sense true. It was said that he was an agent of a certain sort, an agent intrusted with the possession of goods. That also is in a certain sense true: he was intrusted with these wools in his character of warehousekeeper. It was further said that he was also intrusted with the documents of title to the goods. That also is in some sense true. In one sense, therefore, the words of the Act are complied with: Slee was an agent, and he had possession of the goods or the documents of title to the goods. But still the question is, whether he was within the sense of the Act of Parliament an agent "intrusted with the possession of goods or of the documents of title to goods." It was said that, before the passing of the Factors Acts, if a principal allowed an agent to deal with his goods (such dealing being within the general scope of the agent's authority), and he dealt with one who knew the general authority of the agent, but did not know that it was limited or withdrawn, the principal was bound by the acts of his agent. There is no doubt about that. In this state of things, it was said, the Factors Acts were passed. Mr. Benjamin drew our attention to the first of those Acts, 4 Geo. 4, c. 83, which enacted that any person or persons intrusted "for the purpose of sale" with any goods, wares, &c., and by whom such goods, &c., shall be shipped in his, her, and their own names, &c., shall be deemed and taken to be the true owners thereof, so as to enable those dealing with them to hold the goods in spite of the absence of authority in point of fact. That Act was followed by 6 Geo. 4, c. 94, s. 1 of which enacted that any person intrusted "for the purpose of consignment or of sale" with any goods, should be deemed to be the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money, &c., received by him to the use of the consignee. Upon that state of the law the case of *Monk* v. *Whittenbury* (1) was decided. Mr. Benjamin admits that that case was properly decided: but he says that the existing statute 5 & 6 Vict. c. 39 was passed for the purpose of meeting that and some other cases, and that it has no application to the state of the law under the last-mentioned statute. He relies upon the language of the preamble, and upon the absence of the words "intrusted for sale" and "consignment for sale" in ss. 1 and 4, which omission, he says, has substantially altered the law and brought it back to the state it was in before the passing of the first of the Factors Acts. The question is, whether he is correct in that contention. *Monk* v. *Whittenbury* (1) was this case:—Cramp was a flour-factor as well as a wharfinger. He received in his character of wharfinger flour from the plaintiff, without any authority to part with it. He sold it to the defendant. Lord Tenterden, before whom the cause was tried, thought that, if the sale in question was made by an agent, in the ordinary course of business, to a party not apprised at the time that such agent was unauthorized to sell, the purchaser was protected by the Factors Act, 6 Geo. 4, c. 94, s. 4; and he left it to the jury to say whether or not the sale was in the ordinary course of business. The jury found that it was not. And upon a motion for a new trial, his Lordship said: "The material question in this case is, whether Cramp was or was not an agent intrusted with the goods in respect of which this action is brought, within the meaning of 6 Geo. 4, c. 94, s. 4. It is difficult to say precisely what is meant

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(1) Law Rep. 5 Eq. 140.

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(1) 2 B. & Ad. 484.

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in this section by an 'agent intrusted with goods:' but we are clearly of opinion that a wharfinger is not such a person. If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer was not; and, although it is true that Cramp transacted business as a factor with some persons, we do not think that can avail the defendant in the present case." Now, supposing that 5 & 6 Vict. c. 39 had not been passed, and we were dealing with 6 Geo. 4, c. 94, the facts of that case are almost identical with those of the present. The plaintiff had deposited his goods with a person who carried on two descriptions of business, those of factor and wharfinger: and the deposit was made with him as wharfinger, and not as factor for sale. So here, Slee filled the double character of wool-broker and warehouseman; and the wools were deposited with him to hold as warehousekeeper, not as factor to sell, until he should receive specific instructions to do so. If the language of the present Factors Act had been the same as that of the former Acts, that case would have been exactly in point. But it is said that the language of 5 & 6 Vict. c. 39, is altered. No doubt, the words are altered: they are "any agent intrusted with the possession of goods, or of the documents of title to goods;" whereas in 6 Geo. 4, c. 94, s. 1, the words were, "any person intrusted *for the purpose of consignment or of sale* with any goods," &c. What, then, do those words mean? In the first place, are they to be limited at all? And, if so, does it signify whether the capacity in which the agent receives the goods is one which clothes him with authority to sell them? If the matter were res integra, looking at the preamble to the Act and to the operative words of the enactment, and at the course of the decisions upon the earlier statutes, I should have thought the words "any agent intrusted with the possession of goods" were intended to be read with some limitation. In one of the cases a distinction is pointedly taken between "intrusted with possession" and "enabled by possession," and it was said that the former means that the owner intrusts the agent with the goods under some qualifications and limitations. That was the case of *Learoyd* v. *Robinson.* (1) But the matter is not res integra. This Act has been the subject of repeated deci-

(1) 12 M. & W. 745.

sions as well in this Court as in the Court of Queen's Bench and the Court of Appeal in Chancery. It came before the Queen's Bench in *Baines* v. *Swainson*. (1) There, one Emsley was a factor and commission agent to whom a sample of cloth had been sent by the plaintiffs upon his representation that certain merchants had inquired of him for that class of cloths. It turned out that Emsley had no authority to buy for the merchants whose names he had mentioned. Emsley fraudulently sold the goods to other persons, and obtained the money and applied it to his own use. The plaintiffs knew that Emsley was a commission agent, but never had had any transactions with him before. Wightman and Crompton, JJ., held that Emsley was an agent "intrusted" with the cloths, within the meaning of the Factors Acts: but Blackburn, J., thought it was a question for the jury. All of them, however, agreed that the term agent must be construed with a limitation. "The whole question," said Wightman, J., "turns on the power of Emsley to bind the plaintiffs by a sale to the defendants. For the purpose of determining that question, we must look at the statute 6 Geo. 4, c. 94, s. 4. According to the proviso, which is of great importance in considering what cases come within the enacting part, the section applies to cases where the assumed agent, having no authority to sell the goods, sells them notwithstanding, but the transaction must be in the ordinary and usual course of business. Here, the person who sold the goods to the defendant was one whose ordinary course of business was to sell and buy: he was a factor and commission agent; and therefore the case is distinguishable from *Monk* v. *Whittenbury* (2), where there was a sale by a person to whose business a power of sale was not ordinarily incident. Here, it would be the ordinary course of employment of Emsley to sell goods with which he was intrusted: the sale in a particular instance might be in dereliction of duty; but that is another question." Crompton, J., said (3): "I do not construe the word 'agent' as applying to all agents. It is said that the statute will be a dead letter if the Court enters into an inquiry as to the terms on which the owner intrusted the goods. But that argument does not much help us. The question is, whether

(1) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(2) 2 B. & Ad. 484.

(3) 4 B. & S. at p. 281.

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the person was intrusted quâ 'agent'; and the difficulty is to understand what that word really means. In *Monk* v. *Whittenbury* (1), Lord Tenterden remarked that it was difficult to say precisely what the legislature intended by these general words 'any agent intrusted with goods;' but, from the first, it has been understood that they do not apply to every species of agent. My present impression is, that a person is not an agent intrusted with goods within the statute, unless the specific possession of them was given to him quâ agent." And he adds: "That is the effect of the decision in *Monk* v. *Whittenbury*. (1) And I think the right distinction was taken by Wigram, V.C., in *Wood* v. *Rowcliffe* (2), where he said the Act does not apply to other than mercantile transactions." And Blackburn, J., said (3): "I do not agree with the counsel for the defendants, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business (4), amounts to an 'intrusting' him as agent; though I think that under the part of s. 4 of stat. 5 & 6 Vict. c. 39 to which I have referred (5), the fact of a person being put in possession of goods calls upon the person who gave him possession to explain and shew that it was not an intrusting. There are many cases to which my Brother Crompton has alluded, in which goods might come into the possession of a known agent from having been lent or pledged to him, or hired by him; but that, in my opinion, independently of authority, would not be an intrusting. In *Monk* v. *Whittenbury* (1), the goods were not intrusted to such an agent as the Act contemplated, because they had been intrusted to him as a wharfinger, and not as a person by whom the goods were to be sold."

In *Baines* v. *Swainson* (6), therefore, the Court of Queen's Bench, basing their judgment in some degree upon *Wood* v. *Rowcliffe* (7), held that the question under 5 & 6 Vict. c. 39, was very much the same as under 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, viz. what sort of agent the person intrusted was,—whether he was

(1) 2 B. & Ad. 484.

(2) 6 Hare, 183, 191.

(3) 4 B. & S. at p. 285.

(4) "A business which, in the ordinary course, would lead to a sale."

(5) The proviso.

(6) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(7) 6 Hare, 183.

intrusted for the purpose of sale, or a person whose general business it was to receive consignments of goods for sale, and received the goods in that character.

Then there is the further case of *Fuentes* v. *Montis* (1) in this Court, which was confirmed by the Exchequer Chamber. (2) Mr. Benjamin had considerable difficulty in dealing, not so much with the direct decision, but with the reasoning of the judges in that case. The facts, no doubt, were different; for, there, the agent was originally intrusted as agent for sale, but his authority was countermanded before the pledge was made: therefore, when the advance was made upon the security of the warrants, the pawner was no longer an agent authorized to sell. I must confess I should have thought that a sound and just decision. It certainly puts a strong limitation on the words of the Act. De Ponte was a person intrusted with the possession of the goods, and intrusted with them for the purpose of sale: but both Courts held that the words of the Act were to receive a reasonable interpretation, and meant that the agent should be a person intrusted at the time of the transaction. *Wood* v. *Rowcliffe* (3) was cited there; as also (by two of the judges) was *Monk* v. *Whittenbury* (4), which is treated by the Court as a subsisting authority. We arrive, therefore, at the conclusion that a limitation is to be put upon the words of the Act, which brings 5 & 6 Vict. c. 39, though its words are not exactly the same, substantially to the same point as regards the character of the agent to be intrusted, and the capacity in which the goods are received by him. The result is, that, to bind his principals by a sale or a pledge, the agent must have been intrusted with the goods for the purpose of sale, or he must be a person who is ordinarily intrusted to sell such goods, and must have made the sale or the pledge in the course of his ordinary business, in pursuance of the authority so conferred upon him. If that be the present state of the law, the facts of the case now before us bring it clearly within the decisions, and do not sustain the defendants' contention. The facts are these:—Slee carried on the business of a wool-broker. He did not in the ordinary course of his business receive consignments of wool for

(1) Law Rep. 3 C. P. 268.
(2) Law Rep. 4 C. P. 93.
(3) 6 Hare, 183.
(4) 2 B. & Ad. 484.

sale. He was also a warehousekeeper. The plaintiffs were in the habit of warehousing their wools with him,—sheep's wool and goats' wool. The course of business between them and Slee was this:—Before the arrival of any vessel at Liverpool with wool for the plaintiffs, they sent down the bill of lading to Slee, in order that he might receive the wool and warehouse it. Having warehoused the wool, Slee sent the plaintiffs a report and valuation thereon, and then awaited their further instructions as to disposal. As to sheep's wool Slee had no general authority from the plaintiffs to sell, but only acted under specific authority given to him in each case. Goats' wool he never sold. I understand it, therefore, to be distinctly found in the case that it was no part of Slee's duty to receive cargos of wool for sale, but only to warehouse; selling one description of the wools whenever he received specific instructions to do so. In respect of the sheep's wool he acted as the plaintiffs' broker: but he received the whole in his character of warehousekeeper only. It comes, therefore, to this,—if the law under 5 & 6 Vict. c. 39, remains substantially as it was under 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, *Monk* v. *Whittenbury* (1) distinctly applies. The facts here do not shew any more than they did there that the person who pledged (or sold) the goods was a person intrusted with the possession of them so as to enable him to make a valid pledge or sale of them to bind the owners. Upon the law, therefore, and upon the facts found in this special case, it appears to me that, whether we take the mere words of the Act or the authorities which have been referred to, Mr. Benjamin fails to make out his first point. The defendants have not shewn that Slee was intrusted with the possession of these wools within the meaning of s. 1 of 5 & 6 Vict. c. 39.

As to the argument on s. 4, that Slee was intrusted with the bills of lading, the documents of title, and therefore entitled to deal with them as owner,—it has already been pointed out that ss. 1 and 4 are independent sections, and that the authority of the agent described in the former section cannot be enlarged by his having received the documents of title under the latter section, which he did not offer to pledge.

For these reasons, I think the plaintiffs are entitled to judgment.

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(1) 2 B. & Ad. 484.

BRETT, J. This action is brought to determine whether the plaintiffs or the defendants are entitled to the possession of certain wools. It is admitted that the property in all the wool was in the plaintiffs, and that it had not passed from them to the defendants by their authority. But it is contended on the part of the defendants that they are entitled to hold the wool as pledgees, because it was pledged to them by Slee, who was an agent intrusted with the possession of the wool, and so they are within the protection of the Factors Acts. To determine that question, we have to ascertain the true construction of the Factors Acts, and to consider whether the facts found in this special case bring the defendants within their protection. Now, the wools were consigned to Liverpool in certain ships on account of the plaintiffs. Upon their arrival, the plaintiffs sent an intimation to Slee. The character of Slee is described in the case. It was no part of his ordinary business to be a factor. It is found that he was a broker,—one who makes contracts for the purchase and sale of goods for other people, without ever having the goods in his possession. It is found that he was also a warehousekeeper. Thus, he did not carry on the ordinary business of a factor; but he did carry on the ordinary business of a broker, and also an independent and separate business as a warehousekeeper. The bills of lading for the wools were not sent to him otherwise than for the purpose of his receiving the goods to warehouse them. The course of dealing between the plaintiffs and Slee is described in paragraph 4 of the case. And I should put the same construction upon the letters which were appended to the case. He was to receive the wool and to warehouse it, and to await instructions from the plaintiffs as to its disposal. He presented the bills of lading, and received the goods; and then the bills of lading ceased to be the symbols of title to the goods. After certain of the wools in question had been received into his warehouses, and other part not, Slee, on the 5th of April, 1872, assumed to pledge the whole for an advance made to him by the defendants. That was a fraud upon the plaintiffs. None of the wools were in fact delivered by Slee to the defendants; but he agreed to hold them as trustee for the defendants, as a security for the advance, and to sell them under their orders, and to pay over the proceeds to them. They did

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indeed afterwards take forcible possession of the wools under colour of the authority supposed to be conferred upon them by that letter: but there was no actual delivery of the wools by Slee to them. As regarded sheep's wool, Slee acted as a broker for the plaintiffs, but only upon specific instructions given to him in each case; and it is found that no specific instructions were given to him as to these wools. Inasmuch, therefore, as no specific instructions had been given to Slee with regard to these particular wools, he never was a person intrusted with them for the purpose of selling them. The case so finds in distinct terms. The case further finds that, although Slee carried on the business of a wool-broker as to sheep's wool, he never did carry on the business of a broker as to goats' wool. These being the material facts, does the case come within the Factors Acts, and what is the true construction of those Acts? If goods are intrusted to an agent for sale, and he sells or pledges them, the vendee or pawnee is protected against a claim by the real owner. The facts do not bring this case within that category. Slee was never authorized to sell: he never was intrusted with the possession of the wools in such a character as entitled him to sell or pledge them: he merely received them for the purpose of warehousing them. If he had been only a warehousekeeper, it is conceded that the transaction would not have been within the Factors Acts. It is said that Slee being a wool-broker also,—a mercantile agent whose ordinary business it was to sell goods of his principals,—he was a person intrusted with the possession of goods within 5 & 6 Vict. c. 39. If Slee had had the wools consigned to him for sale, or he had been in the habit of receiving consignments for sale, he would be a factor within that Act. But the findings in the case negative that. He was intrusted as warehousekeeper, and not as broker. It was contended that the two characters might be joined together. *Monk* v. *Whittenbury* (1), however, is an authority to the contrary. Upon that point the case has never been overruled, but it has been recognised as a binding authority since the passing of 5 & 6 Vict. c. 39. Construing the Act as it was construed in *Baines* v. *Swainson* (2), and recognised in *Fuentes*

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(1) 2 B. & Ad. 484.

(2) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

v. *Montis* (1), I think the present case is not brought within it, and that the plaintiffs are entitled to the possession of all the wools claimed.

It is unnecessary to decide the second point which has been argued before us, viz. whether, if Slee was in a position to pledge the wools or the documents of title, there was a valid pledge by the letter of the 5th of April, 1872, and therefore it is not necessary to canvass the judgment of Wood, V.C., in *Portalis* v. *Tetley*. (2)

Denman, J. I also agree that the plaintiffs are entitled to judgment on the first point, and therefore that it is unnecessary to say anything on the second point. Upon a dry literal view of the last Factors Act, it might perhaps be contended that Slee, being in possession of the wools, and being in some sense an agent of the plaintiffs, was an "agent intrusted with the possession of goods." But, after the full discussion this case has undergone, I agree with my Lord and my Brother Brett that the Act is not to receive that dry literal interpretation, and that we are bound to construe it according to the general scope of the legislation upon the subject and according to the decided cases. It is not enough that the party shall be in possession of the goods: he must have been intrusted with them for the purpose of dealing with them according to the course of business of an agent, as was said in *Baines* v. *Swainson*. (3) We must therefore ascertain whether or not Slee was in point of fact and of law an agent of that sort. Supposing it were doubtful whether he received the wools in question as an agent for sale or merely as a warehouse-keeper, I am inclined to think with my Brother Blackburn in the last-mentioned case that that would be a question for a jury. But the facts found in this special case leave us in no doubt about the matter. As to the goats' wool, it is found that Slee never dealt in it; and, as to sheep's wool, it is found that he had no general authority to deal with it otherwise than as a warehousekeeper, but only sold it from time to time under a special authority in each case. The letters set out in the appendix shew that he was

(1) Law Rep. 3 C. P. 268.

(2) Law Rep. 5 Eq. 140.

(3) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

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powerless to deal with any of the wool for the purpose of sale until he received further instructions as to the disposal of it. His authority is expressly negatived, and therefore there could be no question to leave to the jury. When, therefore, it is once established that the last Factors Act is not to receive the dry and limited construction contended for by Mr. Benjamin, the case is free from difficulty.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Clarke, Son, & Rawlins.*

Attorneys for defendants: *Chester, Urquhart, Bushby, & Mayhew, for Laces, Banner, & Co., Liverpool.*

END OF EASTER TERM, 1874.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXVII VICTORIA.

1874
May 28.

POPE, Appellant; TEARLE, Respondent.

Adulteration of Food—35 & 36 *Vict. c.* 74, *ss.* 2, 3—"*Declare such Admixture.*"

The 3rd section of 35 & 36 Vict. c. 74, enacts that, "any person who shall sell any article of food . . . knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof before delivering the same and no other, shall be deemed to have sold an adulterated article of food . . . under this Act":—

Held, that a person who had sold mustard admixed with flour and turmeric, substances not injurious to health, declaring at the time of such sale that he did not sell the article as pure mustard, had been guilty of no offence under 35 & 36 Vict. c. 74, and that it was not necessary in order to comply with sect. 3, that he should declare the nature and proportion of the substances admixed.

Case stated by justices of the county of Bedford, under 20 & 21 Vict. c. 43, of which the facts were in substance as follows:—

Upon the hearing of an information laid by the appellant against the respondent for selling as unadulterated an article of food, to wit mustard, which was adulterated contrary to 35 & 36

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Vict. c. 74 (1), it was proved by the appellant, and admitted by the respondent, that the appellant, an inspector of weights and measures duly authorized, went to the shop of the respondent, who is a grocer and provision dealer, and asked for a quarter of a pound of mustard, which was supplied to him by the respondent, and for which he paid him 4*d.* The respondent at the time of delivering the mustard to the appellant said to him, "I do not sell you this as pure mustard," and at the same time pointed out to him a label affixed to the canister containing the mustard on which was printed the words, "warranted free from injurious admixture, but not sold as pure mustard." The appellant asked the respondent what the admixture consisted of, and the respondent replied that he did not know and could not tell.

The mustard was afterwards analysed in pursuance of the Act and found to contain a quantity of wheaten flour and turmeric, which was not injurious to health.

The justices who heard the case were divided in opinion as to the meaning of the words of the 3rd section of the Act, one being of opinion that the declaration, proved to have been made by the respondent, that he did not sell the article as pure mustard, together with the fact that appellant's attention was directed to the label, was a sufficient declaration within the meaning of the section, while the other justice was of opinion that the seller should declare what the actual admixture consisted of, or in other words what besides the mustard were the ingredients which were mixed with it, as well as the amount or quantity of such other ingredients. They therefore dismissed the summons and granted a case.

The question for the opinion of the Court was whether it was necessary for the respondent at the time of sale to do more than simply declare that the article was adulterated, or whether the Act required the vendor to state precisely what the article was adulterated with, and the extent of the adulteration.

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(1) 35 & 36 Vict. c. 74, s. 2: "Every person who shall sell any article of food or drink with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated, shall for every such offence, &c."

Sect. 3: "Any person who shall sell any article of food or drink or any drug, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof before delivering the same, and no other, shall be deemed to have sold an adulterated article of food, or drink, or drug, as the case may be, under this Act."

Merewether, for the appellant. The question is, whether the seller is bound under 35 & 36 Vict. c. 74, s. 3, to state the nature or proportion of the materials admixed, or whether he complies with the section by stating that something has been admixed. It is submitted that the words "and no other" clearly shew that the nature of the admixture must be declared; that he must state the mixture to be such and no other.

[Brett, J. This is a penal statute, and if it is fairly capable of both constructions, must not the most lenient be adopted?]

According to the respondent's contention the 3rd section is unnecessary, for the 2nd section provides that any person selling as unadulterated an adulterated article shall be guilty of an offence.

[Lord Coleridge, C.J. In *Fitzpatrick* v. *Kelly* (1) Blackburn, J., seems to have thought that the 3rd section was intended to refer to admixtures which might not be adulterations within the 2nd section.]

Wills, Q.C. (with him, *Meadows White*), for the respondent. The 3rd section does not create an offence, but only an ingredient in an offence. The mere sale of an adulterated article is not an offence, but only the sale of it as unadulterated within the 2nd section. The only effect of non-compliance with the terms of the 3rd section is that the seller shall be deemed to have sold an adulterated article. It is clear that the respondent did not sell this article as unadulterated, therefore he is not within the 2nd section, which is the section containing the offence.

Merewether, in reply. The contention that the 3rd section does not create an offence, would leave it without meaning, for the provisions of the 2nd section are sufficient to meet the case of a sale without any declaration that the article is adulterated.

Lord Coleridge, C.J. I think the respondent is entitled to our judgment. The question turns upon the effect of the 2nd and

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(1) Law Rep. 8 Q. B. 337.

3rd sections of 35 & 36 Vict. c. 74. It appears to me that the object of the 3rd section probably was that, whereas on the two former sections it might possibly have been thought doubtful whether adulteration within the Act was not confined to the admixture of noxious substances, it might clearly appear that an admixture of any substance not noxious, with intent to increase the weight, unless declared, was intended to be an adulteration within the Act. It appears to me that the respondent is not within the 3rd section, for both by word of mouth and by the printed label he affected the purchaser with notice that there had been some foreign substance admixed with the article sold. If he had sold the article without such declaration of the admixture he would have been brought within the provisions of the 2nd section; he is not under the circumstances within that section, because even supposing that admixture in the 3rd section is the same as adulteration within the 2nd, he has not sold as unadulterated any article which was adulterated.

BRETT, J., concurred.

GROVE, J. I read the 3rd section as meant to obviate any doubt which might arise on the former section as to whether the Act was intended to deal with the admixture of non-injurious substances, as well as of noxious substances, with articles of food and drugs. I see nothing in the Act to lead us to the conclusion that the seller is bound under the 3rd section, besides declaring that some other substance is admixed with the article sold, to declare the nature or quantities of the materials admixed. Some little difficulty may arise as to the meaning of the words "and no other" in the section, but I do not think those words can have the effect contended for by the appellant.

Judgment for the respondent.

Attorneys for appellant: *Lewis, Munns, & Longden.*
Attorneys for respondent: *Ashurst & Morris.*

MELHADO AND ANOTHER *v.* THE PORTO ALEGRE, NEW HAMBURGH, AND BRAZILIAN RAILWAY COMPANY.

1874
June 1.

Joint Stock Company—Preliminary Expenses—Articles of Association—Ratification.

The articles of association of a joint stock company provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed and treated as preliminary expenses, to an amount not exceeding 2000*l.* The plaintiffs, who were promoters of the company, had incurred preliminary expenses in the establishment of the company:—

Held, that no action would lie at the suit of the plaintiffs against the company for non-payment of such preliminary expenses in accordance with the articles of association.

1 Ex 23–
1 Ex D. 88
2 Ch D. 776
7 Ch D 368
370
16 Ch D
127

DECLARATION for that the defendants before and at the time of the breaches of contract hereinafter mentioned were and now are a joint stock company, limited, within the meaning of the Joint Stock Companies Acts, 1862 and 1867; and it was provided by the articles of association of the said company that all accounts, charges, and expenses incurred or sustained in and about the establishment of the company, not exceeding in the whole the sum of 2000*l.*, which the board of directors of the company should consider might be deemed and treated as preliminary expenses, should be defrayed by the company; and the plaintiffs say they were the promoters of the said company, and incurred and sustained charges and expenses in and about the establishment of the said company to an amount greatly exceeding 2000*l.*, and all conditions were performed, &c., necessary to entitle the plaintiffs to receive payment from the defendants of the sum of 2000*l.* in the said articles mentioned. Breach, non-payment of the said sum or any portion thereof.

Demurrer and joinder.

Horne Payne, for the defendants. There is no privity of contract between the plaintiffs and the defendants. The plaintiffs were not parties to the articles of association, and so there is no express contract. The doctrine of ratification is not applicable, because the company was not in existence at the time when the expenses were originally incurred, and ratification can only be of a

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MELHADO *v.* PORTO ALEGRE RAILWAY CO.

contract purporting to be made on behalf of an existing party: see *Kelner* v. *Baxter*. (1) The articles at most are only an authority to the directors, which would justify them in making the payment as between themselves and the shareholders. There is no contract to pay contained in the articles, inasmuch as it is left entirely to the directors' discretion whether they will pay or not. There is no implied contract on the part of the defendants to repay the preliminary expenses, on the ground that they have taken advantage of the plaintiffs' labour and expenditure; for if so, such a contract would arise in all cases where promoters have incurred expense, and the company has afterwards come into existence through such expenditure. The contrary has always been assumed in all the cases on this subject. This is not like the cases where a company formed under a parliamentary enactment has come into existence on some statutory condition giving the person in whose favour such condition is made a right to sue for non-performance of a statutory duty. The term in the articles cannot be said to have been inserted in pursuance of the Companies Acts. The only conditions imposed by these Acts are various conditions as to limited liability. The Defendants might or might not have inserted this term, so far as these Acts are concerned, and they might with certain formalities have altered or rescinded any term of the articles. The equity cases, such as *Touche* v. *Metropolitan Railway Warehousing Co.* (2), proceed on the doctrines which a court of equity applies as between trustee and cestui que trusts, and are not in point with respect to the question arising on this declaration.

[He also cited *Gunn* v. *London Insurance Co.* (3)]

[LORD COLERIDGE, C.J., referred to *Spooner* v. *Parsons* (4) and *Pilbrow* v. *Pilbrow's Atmospheric Ry. Co.* (5)]

Warton, for the plaintiffs. A contract arises from the fact of the defendants having availed themselves of the labour and expenditure of the plaintiffs. The company were not bound to come into existence, but having come into existence, which was only possible through the efforts of the plaintiffs, they were liable to remunerate the plaintiffs. The articles of association once entered into may be considered as the terms of the defendants' statutory existence.

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(1) Law Rep. 2 C. P. 174. 12 Jur NS 1016

(2) Law Rep. 6 Ch. 671.

(3) 12 C. B. (N.S.) 694.

(4) 5 Hare, 102.

(5) 5 C. B. 440.

LORD COLERIDGE, C.J. I am of opinion that the defendants are entitled to our judgment. The action is brought on a clause in the articles of association, by which the directors are authorized to pay certain expenses if they should consider them to be properly deemed preliminary expenses. The declaration avers that all conditions were performed necessary to entitle the plaintiffs to be paid their expenses; and therefore I think we must take it that they were expenses which, if the directors had thought proper to pay them, the articles would have justified them in paying. The question, therefore, is whether an action will lie for the payment of these expenses, in pursuance of the articles of association, to which the plaintiffs were not parties. I have come to the conclusion that no such action will lie—I must say somewhat reluctantly, because, though I wish to express no opinion on the merits of this particular case, having no materials for forming such an opinion, it does seem just, in general, if a company takes the benefit of the work and expenditure by which its existence has been rendered possible, and voluntarily comes into existence on the terms that it shall be liable to pay for such work and expenditure, that a cause of action should be given. I can find, however, no legal principle upon which such an action can be maintained. It appears to me that there is no contract between the plaintiffs and the defendants. The doctrine of ratification is inapplicable, for the reasons given in the judgments in *Kelner* v. *Baxter*. (1) For, supposing that there was a contract between the plaintiffs and certain persons before the existence of the company, which the directors had authority to ratify on behalf of the company, the case of *Kelner* v. *Baxter* (1) is a distinct authority to shew that the company could not ratify such a contract, because they were not in existence at the time the contract was made. Then, again, apart from ratification, I do not think that there is in point of law any contract between the defendants and persons not parties to the articles of association, so as to give a right of action

(1) Law Rep. 2 C. P. 174. 12 Jur NS 1016

against the defendants for preliminary expenses. The articles, no doubt, would be a valid authority to the directors if they had chosen to pay these expenses; but I do not think that any contract express or implied arises as between the defendants and the plaintiffs to pay them. There are, it is true, certain decisions in equity upon cases the facts of which are not in substance dissimilar from those of the present case, in which the plaintiff has been held entitled to recover, such as *Touche* v. *Metropolitan Railway Warehousing Co.* (1), but the principle upon which they proceed is not one which we can apply. It seems to me that the judgment of Lord Hatherley in that case, and that of Vice-Chancellor Wigram in *Spooner* v. *Parsons* (2), are based upon the doctrines which in courts of equity govern the relation of trustee and cestui que trust, and which, however sound and reasonable they may be, we cannot as a Court of law adopt in relation to the question now before us.

MELLOR, J. I am of the same opinion. I agree that, on the allegations contained in this declaration, we may take it that these expenses were such as the directors were authorized to pay by the articles of association. I cannot, however, find any facts alleged in the declaration sufficient to give rise to a cause of action in favour of the plaintiffs. The plaintiffs were not in any way parties to the articles of association, and there was not, therefore, any express contract to pay them. Nor can I see how any implied contract to do so can be inferred. I think we should be stretching the rules of law very much if we were to hold that, under the circumstances disclosed on this declaration, there would be an implied contract on the part of the company to pay preliminary expenses.

BRETT, J. I think we may be entitled to assume, on the allegations contained in this declaration, that before the defendants' company came into existence certain persons had agreed with the plaintiffs that if they would advance money for the purpose of floating the company when the company was formed, it should repay them; that the plaintiffs did advance certain sums of money which were necessary to bring the company into existence; and that after the company was formed the directors did resolve that the plaintiffs ought to be paid, and that they should be paid. Yet, notwithstanding these facts, I am of opinion that they cannot recover. There is no contract, in my judgment, of any sort upon which they can sue, and unless there be a contract of some sort between them and the company, I do not see that they can have any cause of action. No contract made with them before the existence of the company can be ratified by the company for the reasons pointed out in the case of *Kelner* v. *Baxter* (1), with which I fully agree. Then it was suggested that, by taking advantage of their work and expenditure, and coming into existence through them, the company gave rise to an implied contract to remunerate them. It seems to me that the defendants' counsel gave the right answer to this suggestion when he said that if that were so promoters might, in all cases, sue the company for the expenses of promotion. I apprehend that all the decisions on this subject shew that they cannot do so. It was further suggested that the company came into existence on the condition of putting this clause into their articles. But they were not bound to do so by the Act. The plaintiff could not have insisted on their inserting any such provision, and they might do so or not at their pleasure. Therefore it seems to me that it was no condition of their existence. There is, consequently, no contract or statutory duty upon which the plaintiffs can have a cause of action.

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(1) Law Rep. 6 Ch. 671.

(2) 5 Hare, 102.

Judgment for the defendants.

Attorney for plaintiffs: *H. Philipps.*
Attorneys for defendants: *Walters & Webb.*

(1) Law Rep. 2 C. P. 174. 12 Jur N S 1016

1874
June 8.

RHODES AND ANOTHER *v.* THE AIREDALE DRAINAGE COMMISSIONERS.

Arbitration—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18)—*Compensation—Power to state Special Case—Reference by Consent—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 5.

42 L.J. 394
1 C.P.D. 383.
387. 403-4
9 Q.B.D. 521

An umpire appointed in an arbitration to settle the amount of compensation under the Lands Clauses Consolidation Act, 1845, has no power to state a special case for the opinion of the Court.

Where the parties to an arbitration as to amount of compensation under the Lands Clauses Consolidation Act agree in the course of the arbitration to certain deviations from the procedure directed by the Act, they do not thereby render the reference one by consent within the meaning of the Common Law Procedure Act, 1854, s. 5, so as to enable the umpire to state a special case.

Overruled in Ct of Appl 1 C.P.D. 402

DECLARATION, in substance, stated as follows, viz.: that after the passing of the defendants' special Act, which incorporated the Lands Clauses Consolidation Act, 1845, the plaintiffs claimed compensation from the defendants for damages sustained by the plaintiffs as occupiers of certain lands by reason of the exercise by defendants of the powers of the Act, and such claim was referred to two arbitrators nominated respectively by each party, and an umpire was appointed by them; that such arbitrators duly enlarged the time for making their award until the 6th of March, 1871; that before such extended time had elapsed an agreement was come to between the parties by which the time for making the award was extended to the 1st of June, 1871, and the time for the umpire's making his award was to count from such day, or such earlier day, as the arbitrators might devolve it upon him; and, further, that the umpire might sit and hear and take the evidence along with the arbitrators, and in case they failed to make any award the said umpire might act and make his award on the evidence so heard by him; that a subsequent agreement was entered into between the parties, whereby the time for making the award was extended to the 1st of September, 1871, or such other day or time as the arbitrators might by any writing or writings appoint, and the time within which the umpire might make his award was to count from the 1st of September, or the last of such other days or times as might be appointed by the

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arbitrators, or from any earlier time at which the arbitrators should by any writing under their hands request the umpire to make his award; that the arbitrators and umpire having taken upon themselves the burden of the reference, acted together in the matter, and sat together and heard evidence: that the arbitrators failed to make any award, and the parties ultimately agreed that the time within which the umpire might make his award should be extended to the 1st of June, 1873; and that the umpire formally awarded the sum of 110*l.* to the plaintiffs as compensation.

Averment that all conditions, &c., were fulfilled, &c., yet the plaintiffs did not pay to the defendants the said sum.

2nd count containing similar allegations, and claiming a writ of mandamus for the payment of the money.

The 2nd plea set out the award, which concluded as follows: "If I have no power to state my award in the form of a special case for the opinion of the superior Court, of which the submission to arbitration of the matters so referred as aforesaid may be made a rule, then I award and adjudge that the claimants as occupiers of Marly Hill Farm have sustained damages by reason of and consequential upon the exercise by the commissioners of the powers of the drainage Act to the amount of 110*l.*, and are entitled to be paid compensation for the same to that amount; but if I have power to state my award in the form of a special case for the opinion of such superior court as aforesaid, then I hereby state my award of and concerning the matters so referred as aforesaid in the form of a special case as follows." [Then followed the special case.]

Averment that the various matters so recited in the said award as aforesaid were and are respectively true in fact, and that no opinion or judgment of any superior Court had been pronounced or obtained upon the questions stated in the special case for the opinion of such Court.

Demurrer and joinder.

Manisty, Q.C., for the plaintiffs. The arbitrator under the Lands Clauses Consolidation Act has no power to state a special case: *Re Newbold and Metropolitan Ry. Co.* (1) [He was then stopped by the Court.]

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(1) 14 C. B. (N.S.) 405.

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Kenelm Digby, for the defendants. It is contended, first, that a reference to arbitration under the Lands Clauses Consolidation Act is a reference by consent within the meaning of the Common Law Procedure Act, 1854, s. 5, and the umpire has therefore power to state a special case. It was not necessary to decide the point in *Re Newbold and Metropolitan Ry. Co.* (1), and the expression of opinion in that case was merely obiter dictum. Secondly, even if that be not so, it is contended that the subsequent agreements by the parties extending the time and allowing the arbitrators and umpire to sit concurrently, being deviations from the essential requisites of a reference by compulsion under the Act, altered the whole character of the proceeding, and changed it into a reference by consent. But for the consent of the parties the umpire had no jurisdiction to proceed as he did. If the jurisdiction of the umpire was based upon the consent of the parties, and not on the Act, the reference is a voluntary one, and the provisions of the Common Law Procedure Act, 1854, s. 5, apply.

[He cited *Collins* v. *South Staffordshire Ry. Co.* (2); *Martin* v. *Leicester Waterworks Co.* (3); *Palmer* v. *Metropolitan Ry. Co.* (4); *Re Dawson and North Midland Ry. Co.* (5)]

LORD COLERIDGE, C.J. The pleadings in this case raise the question whether the arbitrator had power to state a special case for the opinion of the Court, and if he had not the plea is bad. The arbitration was under the Lands Clauses Consolidation Act. It was not suggested that there are any terms in that Act from which the power to state a case may be implied, and the provisions of the 25th, 26th, and 27th sections, by which the award is to be final, seem very strongly against any such implication. It was, however, suggested that after the proceedings had commenced under the Lands Clauses Consolidation Act, the nature of the arbitration was altered by certain arrangements between the parties as to the mode of procedure in the reference. It was agreed that the time should be extended in a manner not provided for by the Act, and that instead of the arbitrators proceeding to hear the case and then, if they differed, the umpire's hearing it over again, whereby expense and delay would be occasioned, the umpire should sit with the arbitrators in the first instance, and, if they differed, should make his award without a fresh hearing. It was urged that the effect of this was, that the reference ceased to be one under the Lands Clauses Consolidation Act, and became one by consent, because certain terms were added which were not in accordance with the Act, and so that the reference was brought within the terms of the Common Law Procedure Act.

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(1) 14 C. B. (N.S.) 405.

(2) 7 Ex. 5; 21 L. J. (Ex.) 247.

(3) 3 H. & N. 463; 27 L. J. (Ex.) 432.

(4) 31 L. J. (Q.B.) 259.

(5) 9 Ex. 401, n.

I am of opinion that no such consequence follows. The deviations from the Lands Clauses Act were merely with respect to certain technical matters of procedure, and the parties certainly never intended any such consequence as that suggested. What they did only amounted to this: in the course of a compulsory arbitration under the provisions of a statute, they wisely agreed that a certain course should be followed, slightly deviating from the forms of procedure given by the statute, and that no objection should afterwards be taken by either party on the ground that the statute had not been complied with. This did not affect the foundation of the jurisdiction, or turn the reference into a voluntary reference ab initio. Certain authorities were brought before us, but they all seem perfectly consistent with the view I take of this case, viz. that when proceedings are instituted compulsorily under a statute, it is competent to the parties to agree that in certain respects the mode of procedure given by the statute may be varied without the proceedings ceasing to be under the statutory jurisdiction. It would be very unreasonable if it were otherwise, and if the consent of one party to certain deviations from the statute changed the whole character of the proceeding, and let in all manner of consequences never contemplated by him. The case of *Re Newbold and Metropolitan Ry. Co.* (1) is really quite conclusive of the present. All the judges there said that an arbitrator under the Lands Clauses Act is not like an arbitrator at common law, but is merely placed in the position of a compensation jury, and has simply to settle questions of amounts, and not to determine the legal rights of the parties. For these reasons I think the demurrer must be allowed.

KEATING, J. I am of the same opinion. This reference con-

(1) 14 C. B. (N.S.) 405.

fessedly took place under the Lands Clauses Act, and during the course of it the parties agreed to certain slight deviations from the procedure laid down by that Act. It was never intended by them that the reference should cease to be one under that Act, and be converted into a reference by consent, with the incidents attached to such a reference by the Common Law Procedure Act. And it seems to me that there would be need of very strong authority to lead the Court to the conclusion that such an effect would be produced. No such authority has been referred to. The authority of the case of *Re Newbold and Metropolitan Ry. Co.* (1) is strong to shew that an arbitrator under the Lands Clauses Act cannot state a case, and though, as Mr. Digby said, it was not necessary to determine the exact point in that case, Erle, C.J., and Willes, J., clearly expressed an opinion on the subject, which, to my mind, is entirely consistent with good sense.

GROVE, J. I am of the same opinion. It would be a formidable matter where one party has submitted to an arbitration under a statute by which the award is to be final, and may have contemplated such finality as an element in favour of adopting that mode of procedure, that by agreeing to alter some detail of procedure, e.g. by extending the time for making the award, or allowing the umpire to sit in the first instance with the arbitrators, he should let in consequences not at all in his contemplation, alter the whole character of the arbitration, and prevent the award from being final. None of the cases cited seem to me to go to such a length, and the obvious meaning of the words of the Common Law Procedure Act and the reason of the thing appear to me entirely opposed to the defendants' contention. I do not, however, wish to be understood as meaning that the parties might not, by consent, so alter the nature of the arbitration during the course of the proceedings that it might cease to be under the statute, but in this case I am clearly of opinion that no such effect was produced. I therefore think our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Field, Roscoe, & Co.*
Attorneys for defendants: *Phelps & Sidgwick.*

(1) 14 C. B. (N.S.) 405.

OGDEN *v.* BENAS AND OTHERS.

1874
June 9.

Banker—Forged Indorsement of a Cheque made payable to Order—16 & 17 Vict. c. 59, *s.* 19.

The 19th section of 16 & 17 Vict. c. 59, which protects the banker upon whom a cheque is drawn against the forgery of the indorsement of the person to whose order it is made payable, does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement.

10 Ex 187
10 QB 293,
1 CPD 580
1 Ex D 371,
2 CPD 153
5 CPD 10,

THIS was an action upon a concessit solvere in the Lord Mayor's Court, London. It was brought by the plaintiff, a tradesman in London, against the defendants, who are bankers and money changers at Liverpool, claiming a sum of 12*l.* 12*s.* as money received by the defendants to his use. It appeared that the plaintiff had remitted by post to one Vincent Willis, at Liverpool, a crossed cheque for 12*l.* 12*s.*, drawn by him upon the London and County Bank, payable to Vincent Willis or order. At the trial before Tindal Atkinson, Serjt., on the 10th of February last, no witnesses were called, but the cheque was produced and the following admissions, signed by the respective parties, were read:—

"1. That the 12*l.* 12*s.* claimed by the plaintiff was received by the defendants from the City Bank (their London agents) on the plaintiff's cheque payable to the order of Vincent Willis:

"2. That such cheque was received by the defendants from a person representing himself to be and signing 'Vincent Willis,' in the presence of Mr. Alfred Benas, one of the defendants, to whom, after receiving the amount, the defendants paid the same, less commission:

"3. That the payee of such cheque, Vincent Willis, did not indorse the same, nor authorize his signature thereto."

A verdict was entered for the plaintiff for 12*l.* 12*s.*, leave being reserved to the defendants to enter a verdict for them or a nonsuit. On the 7th of March the following rule was obtained in the Lord Mayor's Court:—

"It is ordered that the plaintiff do shew cause, at the sittings of this Court to be holden in April next, why the verdict found for the plaintiff on the trial of this cause should not be set aside, and instead thereof a verdict entered for the defendants, or a nonsuit

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entered, or why a new trial should not be had between the parties, on the ground that on the facts before the Court no case of money had and received was disclosed upon the trial."

This rule came on for argument before the Common Serjeant on the 23rd of May. The learned judge, after time taken to consider, ordered "that the verdict found for the plaintiff be set aside, and instead thereof a nonsuit be entered (with costs of and occasioned by the rule), leave being reserved to the plaintiff to move in any of the Superior Courts to set aside this rule."

May 30. *Wetherfield* obtained a rule nisi to set aside the nonsuit and enter a verdict for the plaintiff, on the ground that, on the facts before the Lord Mayor's Court, the plaintiff was entitled to the verdict, with costs. He submitted that the 19th section of 16 & 17 Vict. c. 59 (1) only protects the banker upon whom the cheque is drawn, and not a third person who takes it upon a forged indorsement, by which no property passes. He referred to Byles on Bills, 11th ed. 36.

M'Intyre, Q.C., and *M'Connell* shewed cause. The defendants, as bankers, are within the protection of the statute, and cannot be called upon to refund the proceeds of the cheque. They received it in the ordinary course of business, and without negligence; and the plaintiff was guilty of laches in sending the cheque in a letter unprotected by registration. In causing the cheque to be presented to the drawees, the defendants were acting merely as agents of the person who as bearer appeared to be entitled to receive the money. Under these circumstances, they can hardly be said to have received money of the plaintiff's. [*Société Generale* v. *Metropolitan Bank* (2) was cited.]

June 9. *Wetherfield,* in support of the rule. The case cited was an action on contract, where there must be privity. This action is founded upon tort: the defendants have wrongfully possessed themselves of the plaintiff's money; and, as they have no equitable right to retain it, he may waive the tort and sue them for money received to his use. It is said that the defendants were merely acting as agents; assuming that they were so, they could have no greater authority or right to deal with the cheque than had their principal, who stole the cheque and forged the indorsement. No question of negligence on the part of the plaintiff could arise here. Nothing was left to the jury; nor was the learned serjeant asked to leave anything to them.

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(1) 16 & 17 Vict. c. 59, s. 19: "Any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement, or any subsequent indorsement, was made by and under the direction or authority of the person to whom the draft or order was or is made payable either by the drawer or any indorser thereof."

(2) 28 L. T. 848, 858.

KEATING, J. At the request of my Lord, who is somewhat indisposed, I proceed to give judgment in this case. I am of opinion that the rule to enter a verdict for the plaintiff should be made absolute. Although the amount in dispute between the parties is small, the principle involved is one of very considerable importance to the commercial world. The facts are few and simple. The plaintiff, having a payment to make to a person named Willis at Liverpool, sent him by the post a cheque for 12*l.* 12*s.* drawn upon his bankers, the London and County Bank, and made payable to Mr. Vincent Willis or order, and crossed in the usual way. The defendants are bankers at Liverpool. On the 18th of February, a person who was wholly unknown to them, but who has been described as a respectable-looking man, presented the cheque at their banking-house in order that they might through their agents in London obtain the money from the bankers upon whom it was drawn; and the person so presenting the cheque indorsed it, at the request and in the presence of one of the defendants' firm, with the name of "Vincent Willis." He was told to call for the money on the 21st. He did call, and got the money. The defendants had in the meantime transmitted the cheque to their agents in London, the City Bank, who presented it in due course and obtained payment. It now turns out that the name "Vincent Willis" written on the back of the cheque was a forgery; and the question is how far 16 & 17 Vict. c. 59, s. 19, prevents the plaintiff from following his money into the hands of the persons who have obtained it by means of that forged indorsement. Now,

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the section says that "any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to *the banker* to pay the amount of such draft or order to the bearer; and it shall not be incumbent on *the banker* to prove that the indorsement, or any subsequent indorsement, was made by and under the direction or authority of the person to whom the draft or order was or is made payable either by the drawer or any indorser thereof." As against his customer, the banker paying the money would be protected. But the protection of the statute is not extended beyond him; nor does it affect the drawer's right to get back his money from one who has obtained it by means of the forged indorsement. The banker holds the money of his customer. He is bound to know the signature of his customer; but he cannot be expected to know the signatures of those persons into whose hands a cheque drawn payable to order may come; and therefore it may be right that *he* should be protected against a forged indorsement. The money paid by the drawees of the cheque to the correspondents of the defendants, therefore, was money of the plaintiff which the defendants had no right to receive, and consequently the plaintiff is entitled to recover it back. The suggestion that the defendants acted merely as agents for the person who was guilty of the forgery cannot alter the nature of the transaction. They could have no greater right than their principal had. It was urged in argument that the defendants took all the precaution they could, inasmuch as they did not hand over the money to the person who represented himself to be Vincent Willis until they had sent the cheque to London for presentment. I may, however, observe that that was no precaution at all. The defendants must have known that the London and County Bank would not be responsible for the genuineness of the indorsement. The payment of the cheque was no authentication of the indorsement. The case stands simply thus:—The defendants have obtained the plaintiff's money from his bankers through the medium of a forged indorsement, the bankers being protected by the statute against the consequences of the forgery, but the defendants being without that protection. With regard to the suggestion of negligence on the part of the plaintiff, it is to be observed that that point was not raised at the trial; nor could the case be argued on that footing here. But I must say that I fail to see in the circumstances of this case any negligence on the part of the plaintiff which ought to deprive him of his remedy against persons who have discounted his cheque with a forged indorsement, and thereby obtained money which they had no right to receive, without, as it seems to me, taking any precaution whatever to guard against fraud.

LORD COLERIDGE, C.J. I am entirely of the same opinion.

GROVE, J. Having only heard the argument in support of the rule, I do not think it right to pronounce any judgment in this case. But, as far as I am entitled to form an opinion upon what I have heard, my impression is in favour of the plaintiff's right to recover. The reason why the statute limited the protection in the way it did was, as my Brother Keating has suggested, that, though it was thought that bankers must be acquainted with the signatures of their customers, they could not fairly be supposed to know the signatures of all the indorsees of cheques drawn payable to order.

Rule absolute. (1)

Attorney for plaintiff: *G. M. Wetherfield.*

Attorneys for defendants: *Chester, Urquhart, Bushby, & Mayhew, for Frodsham & Nicholson, Liverpool.*

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(1) The authority of a superior Court to question a ruling in the Lord Mayor's Court depends upon s. 10 of the Mayor's Court Procedure Act, 1857, 20 & 21 Vict. c. clvii., which enacts that "if upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move in any of the superior Courts to set aside a verdict or a nonsuit, and to enter a verdict for the plaintiff or defendant, or to enter a nonsuit, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court, *within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in such superior Court*, for a rule to shew cause why such verdict or nonsuit should not be set aside, and a verdict entered for the plaintiff or defendant, or a nonsuit entered, or why a new trial should not be had, as the case may be, in such action; which Court is hereby authorized and impowered to grant or refuse such rule (which rule, when granted, shall operate as a stay of proceedings until the determination thereof), and afterwards

1874
June 16.

[IN THE EXCHEQUER CHAMBER.]

RODOCONACHI AND OTHERS *v.* ELLIOTT.

5 QBD 172

Marine Insurance—Description of Voyage—Overland Transit—Detention of Goods in besieged Town—Restraint of Princes—Abandonment—Total Loss.

In a policy of insurance on goods the voyage was thus described: "At and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London viâ Marseilles and [or] Southampton, including all risks of craft to and from the steamers," &c. The risks insured against were, amongst others, of the seas, fire, and thieves, arrests, restraints, and detainments of all kings, princes, and people, &c. In the margin of the policy was the following memorandum: "It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only." The goods insured were shipped from Shanghai for London by the Messageries Impériales; the practice of that company was to send such goods overland through France by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne, and thence to London; and this course of business was well known among underwriters.

The goods in question arrived in Paris on their way on the 13th of September, 1870. At this time the German armies were advancing on Paris, and had seized parts of the Northern Railway, so that the goods could not be forwarded to Boulogne, and by the 19th of September they completely surrounded and besieged Paris, preventing communication between it and all other places, by reason of

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to proceed to hear and determine the merits thereof, and to make such orders thereupon, and as to costs, as the same Court shall think proper."

Apart from the singularity of two rules being granted for the purpose of determining the propriety of the same ruling, viz. one in the Mayor's Court, under s. 22 of the Act, which enacts that "the judge of the Court may at any time, within the jurisdiction of the Court, hear and grant applications for rules to shew cause in arrest of judgment, or for judgment non obstante veredicto, or for a repleader, or for granting new trials, and for entering nonsuits and verdicts in causes pending in the court," and the other in a superior Court,—for which, so far at least as the Court of Common Pleas is concerned, there would seem to be no precedent,—the motion in this case was not made within the first four days of term,—not until the 30th of May—and also it was not a motion pursuant to the leave reserved at the trial. The ruling at the trial was in favour of the plaintiff, and the leave reserved was to the defendants. This rule was moved on behalf of the plaintiff; and its object was, not to call in question the ruling of the judge at the trial, but to correct the erroneous decision of the Common Serjeant upon the motion made before him in pursuance of the reservation at the trial.

which it was impossible to remove the goods from Paris. This state of things continued till after the 7th of October, on which day the assured gave notice of abandonment:—

Held, affirming the decision of the Court below, that the policy covered the overland transit from Marseilles to Boulogne; and that there was a constructive total loss by restraint or detainment of princes, within the meaning of the policy.

ERROR from the judgment of the Court of Common Pleas, in favour of the plaintiffs, upon a special case. The facts of the case are fully set out in the report in the court below. (1)

Day, *Q.C.* (with him *J. C. Mathew*), for the defendant. The terms of the policy are inapplicable to a terrene risk. There is nothing to shew that the general practice was for the goods to go viâ Paris. The case is therefore distinguishable from *Pelly* v. *Royal Exchange Assurance Co.* (2) There was no loss within the meaning of the policy. It is contended that there was no actual total loss by "restraint of princes," nor any loss that would entitle the assured to give notice of abandonment. A restraint of princes must be some act of a ruling power actually exercised over the goods, some act of dominion or control over them. An embargo differs from a blockade. It is an act of state depriving the owner of the goods of his control and dominion over them. Here the goods were never touched nor interfered with by the French Government. They could not be sent on simply because no persons would venture out of Paris. It was merely as if all the railways being employed for warlike purposes, they could not be sent on for want of means of carriage.

[He cited *Geipel* v. *Smith* (3); *Hadkinson* v. *Robinson* (4); *Aubert* v. *Gray*. (5)]

Field, Q.C. (with him *Thesiger, Q.C.*), for the plaintiffs.

[The Court intimated that he might confine his argument to the question whether there was a loss by restraint of princes.]

It is not necessary that there should be any exercise of dominion over the goods themselves, it is sufficient if the action of the state restrains the owner from dealing with his goods: *Powell* v.

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(1) Law Rep. 8 C. P. 650.

(2) 1 Burr. 341.

(3) Law Rep. 7 Q. B. 404.

(4) 3 B. & P. 388.

(5) 3 B. & S. 163; 32 L. J. (Q.B.) 50. 9 Jur. N.S. 714

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Hide. (1) *Hadkinson* v. *Robinson* (2) is distinguishable. The case of a ship being prevented from going into a port and that of one restrained from leaving a port by a blockade are distinguishable. In the former case the goods can be taken elsewhere, and it is the voluntary act of those in charge of them that prevents their entering the port. Here it is found that it was impossible for the goods to leave Paris. The American authorities are distinctly in favour of the plaintiff: see *Olivera* v. *Union Insurance Co.* (3); *Saltus* v. *United Insurance Co.* (4); *Schmidt* v. *United Insurance Co.* (5); Wheaton's International Law, p. 819; *Roux* v. *Salvador* (6); *Bird* v. *Jones* (7); *The Express* (8); *Barker* v. *Blakes.* (9)

Day, Q.C., in reply.

Cur. adv. vult.

June 16. The judgment of the Court (Bramwell and Pigott, BB., Quain and Archibald, JJ., and Amphlett, B.), was delivered by

BRAMWELL, B. The first point made by the defendant, in the argument before us very faintly, and not at all in the court below, was that, supposing there was a loss within the policy, there was no right of abandonment, the plaintiffs having sold the goods insured and the vendees having claimed them on their arrival. The answer is, that if the plaintiffs had the right of abandonment and did abandon, the abandonees, the underwriters, thereby acquired all the rights of the assured, including their right to the price of the goods from the vendees.

The second point made by the defendant was, that the policy was limited to marine risks. What was in the contemplation of the parties does not matter, though we do not doubt that the assured must have had the whole journey in view. We must see what the policy says. It seems to us that it very clearly, in words, includes the whole transit by land as well as by sea. The words are, "At and from Shanghai to Marseilles and London viâ Marseilles." The slovenly mode of saying "and or," if the words were critically examined, might make a difficulty, though not on this question; but bearing in mind the course of carriage and transit found in the case, there can be no doubt the voyage or journey described includes a land passage through France. No doubt many of the perils are sea perils exclusively; "perils of the seas" are named, but many are common to land and sea, as "fire" and "thieves." With respect to the argument that, as all risks of craft are mentioned, it follows that while inland there is no insurance, the answer is that those words are necessary to cover the risk of the original embarkation and final landing, which would not be included in the words "at and from" and "shall be arrived at." We see nothing to make us limit the plain words of the policy to the sea part of the transit.

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(1) 5 E. & B. 607; 25 L. J. (Q.B.) 65. 2 Jur. N.S. 87

(2) 3 B. & P. 388.

(3) 3 Wheat. 183.

(4) 15 Joh. 523.

(5) 1 Joh. 249.

(6) 3 Bing. N. C. 266.

(7) 7 Q. B. 742.

(8) Law Rep. 3 A. & E. 597.

(9) 9 East, 283.

There remains the question of whether there has been a loss from a peril within the policy. For if so, it seems to us there was a right to abandon, there being a loss of the goods, the assured having lost all control over them for an indefinite time, which might extend to such a period as to cause at least a loss or failure of the particular adventure, and possibly a total loss of the goods, or more or less damage to them. In such a case the assured has a right to throw the risk on the underwriter: Phillips on Insurance, p. 1624.

Now, the facts found are, that the goods safely arrived at Paris; that on September 10th carriage by railway from Paris to Boulogne became, and till after the commencement of this suit continued, impossible, in consequence of the German armies having taken possession of parts of the railway and intercepted all communications thereby between Paris and Boulogne. This was the usual way in which such goods were sent from Marseilles, en route to London. It was not said that they could not have been sent to Havre or other ports, but we think this immaterial. For, supposing they could and ought to have been but were not, and supposing that in this the carriers were guilty of a breach of duty, that would not make the loss the less a loss to the assured. It is afterwards found that, while the silks remained at Paris, on September the 19th, the German armies completely invested Paris; and that from that day until the commencement of the action, they completely surrounded and besieged Paris, and held military possession of all roads leading out of Paris, and prevented communication between Paris and all other places, by reason whereof it was impossible to remove the silks from Paris. The result of this state of things undoubtedly was that the goods were prevented from leaving Paris, and the whole adventure was broken up, and so continued at the time when the notice of abandonment was given and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods, by restraint of kings and princes within the terms of the policy. This is not a mere temporary retardation of the voyage, but a breaking up of the whole adventure. It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, "to a destruction of the contemplated adventure": *Anderson* v. *Wallis* (1); *Barker* v. *Blakes.* (2)

But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army.

What we have to look at is whether, by the immediate and direct pressure of the German army, the goods were prevented from reaching their destination. A siege like the present, which was intended to reduce the besieged place by famine, is a prohibition of all commerce and intercourse with the besieged place. Neutrals would have no right to cross the German lines in order to bring out their goods, or for any other purpose that would or might in the least interfere with the military operations. In the case of a maritime blockade, neither the ships nor the goods on board of them within the port, and which are prevented from coming out, are seized or arrested or in the actual possession of the blockading force; there is no specific action on the ships or goods beyond the prohibition against leaving the port. But surely they are "restrained" from coming out, and the prosecution of the adventure is thereby effectually impeded. We quite agree with the opinion expressed on this subject by the Supreme Court of the United States in *Olivera* v. *Union Insurance Co.* (1), and which was quoted before us, that the inhabitants of a besieged town or the ships in a blockaded port may be properly said to be "restrained" from coming out by the action of the besieging army or the blockading force. A siege, where the place is completely surrounded and invested, is a stronger case than a mere maritime blockade. In the latter case the land communications are unaffected, and the commerce by sea only is interdicted. But we are unable to draw any material or substantial distinction between the two so far as they operate to prevent or restrain all intercourse or commerce, or the entry into or exit of any goods from the besieged or blockaded places. Grotius, Book 3, I. 5, places "oppidum obsessum vel portus clausus" exactly on the same footing, as regards the right of neutrals to hold commerce with the belligerents; and Lord Stowell's definition of a blockade is still more applicable to a siege like the siege of Paris than to a blockade merely maritime. "A blockade," he says, "is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than importation:" *The Vrow Judith* (2). If, therefore, the effect of the siege of Paris was to cut off entirely all foreign connection and correspondence, we think that the goods in this case were restrained or prevented from leaving Paris by the operation of that siege. It appears to us that the words "restraints and detainments of all kings and princes, and people of what nation, condition, or quality soever," are wider and more comprehensive words than those which precede them, and that they include and cover the case now under consideration. And as a verbal matter, we may observe that "restraint" is a word more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods. We

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(1) 2 M. & S. 240.

(2) 9 East, 283.

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(1) 3 Wheat. 183.

(2) 1 Rob. 152.

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cannot help thinking that the doubt arises through the speedy arrival of these goods uninjured. Had they been perishable goods destroyed by the delay, it would be difficult to say their loss was not caused by the restraint of princes. For these reasons we are of opinion that the goods insured by the present policy were either restrained from leaving Paris or were detained within Paris by the immediate and direct action of the German army, and were therefore so lost by one of the perils insured against as to entitle the assured to abandon them to the underwriters and claim for a total loss. We think, therefore, that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Markby & Tarry.*
Attorneys for defendant: *Waltons, Bubb, & Walton.*

June 24.

[IN THE EXCHEQUER CHAMBER.]

SOWERBY *v.* SMITH.

Inclosure Act—Game—Reservation of Rights of Sporting to Lord of Manor.

4 C P D 444

An inclosure Act directed the commissioners appointed thereby to allot to the lady of the manor, her heirs and assigns, a certain proportion in value of the lands to be inclosed in lieu of, and as a full compensation for, the right and interest of such lady of the manor in and to the soil of the said lands, and to allot the residue amongst the other persons entitled to rights of common; and it was enacted that the several allotments should be vested in the allottees respectively in full bar and satisfaction of all rights of common and other rights and interests whatsoever in, over, and upon the said lands (except such manorial rights as were thereinafter reserved to the lady of the manor, her heirs and assigns); and that all rights of common should cease over the said lands. The reservation clause provided that nothing in the Act contained should prejudice the right, title, or interest of the lady of the manor, her heirs and assigns, in or to the seigniory or royalties incident or belonging to the manor; but that she might hold and enjoy all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons or deodands, &c., royalties, jurisdictions, franchises, matters, and things whatsoever to the said manor, or to the lord or lady thereof incident or belonging, or which had been theretofore held and enjoyed by the lady of the manor or any of her ancestors (other than and except such common right as could or might be claimed by the said lady of the manor as owner of the soil and inheritance of the said commons or waste grounds):—

Held (by Cockburn, C.J., Bramwell, B., Mellor, J., and Amphlett, B.; dissenting, Cleasby and Pollock, BB.), affirming the decision of the Court below, that the Act did not reserve to the lady of the manor the right of shooting which she formerly possessed over the lands allotted under the Act by virtue of her ownership of the soil.

ERROR from the judgment of the Court of Common Pleas, in favour of the plaintiff, upon a special case. (1)

The facts sufficiently appear from the judgments.

Field, Q.C. (with him *Barker*), for the defendant. The case raises the question whether there was evidence of a right of free-warren in the defendant. It is now admitted that there is no ground for claiming such right. The only question therefore is, whether there was an exclusive right of shooting in the lord of the manor over the allotments reserved by the inclosure Act. The date of the Act is 1798, and it must be construed with reference to the ideas prevailing at that time. It was very generally supposed then that the lord of the manor had as such a right of shooting over the manor, and no accurate distinction was drawn between territorial and manorial rights: *Pickering* v. *Noyes* (2); *Graham* v. *Ewart.* (3) It is contended that it was clearly the intention of the Act to preserve the substance of all ancient rights, and among them the right of shooting, which the lord had de facto enjoyed. The language of the Act is in many cases not technically accurate. It speaks of rights of common belonging to the lady of the manor, whereas the lady of the manor could not have a right of common over her own soil. A similar inaccurate mode of expression has not been infrequent: see *Askew* v. *Wilkinson* (4); *Arundell* v. *Lord Falmouth* (5); *Lloyd* v. *Lord Powis* (6); *Musgrave* v. *The Inclosure Commissioners.* (7)

[MELLOR, J. You have to make out that a new right was created by the Act, for before the Act the lord had no such right as now claimed. Must not the words be very strong to have that effect?]

(1) Law Rep. 8 C. P. 514.

(2) 4 B. & C. 639, 648.

(3) 11 Ex. 326; 25 L. J. (Ex.) 42; 1 H. & N. 550; 26 L. J. (Ex.) 97.
5 Jur N.S. 773, 3 L 168.

(4) 3 B. & Ad. 152.

(5) 2 M. & S. 440.

(6) 4 E. & B. 485; 24 L. J. (Q.B.) 145.

(7) Law Rep. 9 Q. B. 162.

(6) S C 1 Jur N.S. 230

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The right may be a new one technically, but in substance it was always enjoyed. The allotment to the lady of the manor is to be in lieu of her rights, with the exception of those reserved. The case turns, therefore, wholly on the question what those rights are. It is true that they are termed manorial in the compensation clause, but many of the rights mentioned in the saving clause are not manorial—as, for instance, rights of fishery.

[MELLOR, J. All the rights mentioned before and after are in their nature manorial rights.

BRAMWELL, B. Is not the probability that these words were general words put in to preclude the possibility of the extinction of any manorial rights that might exist, whereas the defendant's contention involves the creation of a right of an odious nature that never existed before?]

If such a right is reserved, it must be taken that that was considered in fixing the amount of the compensation to be allotted. The object of the Act is to destroy the rights of common and allot the land in severalty, not to deal with any other privileges of the lord.

[MELLOR, J. Assuming that there was great confusion at that time as to what were territorial and what were manorial or seigniorial rights, must we not look at the collocation of the words? May it not have been the object of the parties, being uncertain what the manorial rights were, to preserve them, whatever they might be?]

The expression "other than such common right as could or might be claimed by the said Margaret Walker as owner of the soil of the said commons," shews what the intention of the Act was. It being erroneously supposed that the right of the lady of the manor to depasture on the common was a right of common, it is meant that this should be extinguished over the soil allotted, and the other rights she had previously de facto enjoyed should be preserved.

In *Bruce* v. *Helliwell* (1) the rights claimed by the lord as owner of the soil were expressly taken away: see *Greathead* v. *Morley*. (2) The expression "manorial" may well mean "manorial" in the popular sense of the term: *Lord Leconfield* v. *Dixon*. (3) In

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(1) 5 H. & N. 609; 29 L. J. (Ex.) 297.

(2) 3 M. & G. 139.

(3) Law Rep. 2 Ex. 202; 3 Ex. 30.

Ewart v. *Graham* (1) it is true that there was a right of shooting reserved "over the stinted pasture and every part and allotment thereof;" but the judgment of the House of Lords did not turn on those words. That case is, it is submitted, a conclusive authority in the defendant's favour.

[BRAMWELL, B. If there were any land in the manor over which any right of shooting, which was de facto exercised, must have been in the nature of a manorial, and not a territorial, right, before the Act,—as, for instance, any of the ancient inclosures,—that would satisfy the words used.

COCKBURN, C.J. If it were supposed that a right of free warren existed, that would satisfy the words used, being in the nature of a manorial right.]

J. W. Mellor (with him *Jeune*), for the plaintiff. It is probable that at the time the Act passed, it was believed that there was a right of free warren, for such a right was originally claimed in this action. If the parties had intended that there should be a reservation of the territorial right of shooting, or rather the creation de novo of an incorporeal right of shooting, apart from the ownership of the soil, they would have provided for it in express words. The allotments to the lady of the manor are to be in compensation for all rights of common, and "other rights and interests whatsoever, except manorial rights." The expression "manorial" does not occur in the exception clause in *Lord Leconfield* v. *Dixon* (2), and the other authorities cited by the defendants' counsel. The present case is peculiar in that respect, and the expression must be taken to govern the whole of the reservation clause, and to shew what was intended to be included in it: 4 & 5 Vict. c. 35, s. 82, is an example of the use of the term rights of fishing and shooting as applied to manorial rights only. *Ewart* v. *Graham* (1) is altogether distinguishable from the present case, there being a right of shooting expressly reserved over the allotments, together with a reservation of mines. If the defendant's contention be correct, this is not a reservation, but a grant over lands not part of the demesne lands of the manor, and over which no such rights existed before. That cannot have been the intention of a mere saving clause such as this. The expression "common right" in the saving clause cannot have the meaning attached to it by the defendant. It clearly means rights in the commons.

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(1) 7 H. L. C. 331.

(2) Law Rep. 2 Ex. 202; 3 Ex. 30.

Field, Q.C., in reply. There is not in substance any creation of a new right. The Act ought to be construed according to the intention of the parties, not according to technical law. A private Act is in the nature of a bargain between the parties.

[COCKBURN, C.J. It is not enough that we may conjecture the intention of the parties to have been this or that, unless we can find words used to give effect to that intention. Assuming that the parties thought that the right of shooting was a manorial right, if they have used words of reservation importing manorial rights only, the right will not be reserved. The word "liberty" cannot properly be applied to a territorial right of shooting.]

The right became a liberty at the moment the soil was taken from the lord, and might therefore be so described in the reservation clause. The words used here are exactly equivalent to those used in *Ewart* v. *Graham*. (1) There the liberty was of taking, &c., over the allotments: here it is of shooting, &c., within the said manor, which includes the lands allotted.

[BRAMWELL, B. The other things mentioned in the reservation clauses are none of them things that could have been destroyed if not reserved, as, for example, the quit-rents. Does not this shew that the clause was put in ex majori cautelâ to prevent all question as to the rights strictly manorial?]

Cur. adv. vult.

June 24. The following judgments were delivered:—

COCKBURN, C.J. The question for our decision in this case is, whether the lord or lady of the manor of Messingham, in the county of Lincoln, is entitled to shoot and take the game on the freehold inclosures allotted under an inclosure Act, in lieu of rights of common enjoyed by the allottees prior to the passing of the Act in the commons and waste lands of the manor. The inclosure Act in question was passed in the 38 of Geo. 3. It provides for the inclosure of the commons and waste lands in the township of Messingham and in that part of the hamlet of East

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(1) 7 H. L. C. 331.

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Butterwick which is within the township of Messingham. After reciting that Margaret Walker is the lady of the manor of Messingham, and of that part of East Butterwick which is within the township of Messingham, and as such is interested in the soil of the waste grounds within the manor, it provides that the commissioners appointed under the Act shall set out and allot unto the said Margaret Walker, her heirs and assigns, as lady of the manor of Messingham aforesaid, exclusive of all other allotments to the said Margaret Walker, in respect of her other property, such part and parcel of the residue of the commons and waste grounds hereby directed to be divided and inclosed, as shall (quantity, quality, and situation considered), in the judgment of the said commissioners, be equal in value to one twentieth part, and no more, of the said commons and waste grounds, in lieu of and as a full compensation for the right and interest of the said Margaret Walker, her heirs or assigns, in and to the soil of the said commons and waste grounds, by this Act directed to be divided and inclosed. By the 2nd section, it is provided that the several lands and grounds so to be set out and allotted unto and for the several persons who by virtue of this Act shall be entitled to the same, shall be, and are hereby, vested in them respectively, in full bar of and satisfaction for all rights of common, and other rights and interests whatsoever over and upon the said lands and grounds hereby directed to be divided and inclosed, except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns, and that from and immediately after the making of the said division and allotments, all rights of common in over and upon all the lands and grounds intended to be inclosed shall cease and determine, and for ever be extinguished. Then follows a clause reserving the rights of the lady of the manor, in these terms: "Nothing herein contained shall prejudice, lessen, or defeat the right, title, or interest of the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively for the time being be lady or ladies, lord or lords, of any manor or manors, lordship or lordships, or reputed manors or lordships within the jurisdiction or limits whereof the said township of Messingham, or the said part of the said hamlet of East Butterwick, or the said fields, ings, meadows, pastures, moors, and other commonable lands and waste grounds hereby directed to be inclosed or exonerated from tithes, or any part thereof respectively are comprised, of in or to the seigniory or royalties incident or belonging to such manor or lordship, or either or any of them, but that the said Margaret Walker and all succeeding lords and ladies of the said manor shall and may from time to time, and at all times, hold and enjoy all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, treasure trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters, and things whatsoever, to the said manor, or to the lord or lady thereof, incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker, or any of her ancestors (other than and except such common right as could or might be claimed by the said Margaret Walker, as owner of the soil and inheritance of the said commons or waste grounds), in as full, ample, extensive, and beneficial a manner, to all intents and purposes as they respectively could or might have held and enjoyed the same, in case this Act had not been made." The Act was duly carried into execution by the commissioners appointed under it. The twentieth part of the wastes was allotted to the lady of the manor, in extinguishment of her right to the soil of the waste, and the residue was divided among the commoners, as directed by the Act, in extinguishment of their rights of common, whereby each allottee acquired a several freehold in the land so allotted to him. It is over the lands so allotted and inclosed that the lady of the manor claims the right of sporting and shooting.

The right having been asserted by going on the plaintiff's allotment, an action of trespass was brought in the Court of Common Pleas; and on the case coming on for trial, a verdict for the plaintiff was taken by consent, subject to a special case. On the argument in banc, judgment was given in favour of the plaintiff, from which judgment error has been brought. I am of opinion that that judgment must be affirmed.

At and before the time when this action was brought, the right claimed and asserted by the lady of the manor was a much larger right than that contended for before us, being no less than a right of free warren claimed over the whole of the manor, or, at all events, as stated in the plea, a right to sport on the wastes as a profit à prendre, otherwise than in respect of being seised of the waste, so as to constitute the right a manorial right in the terms of the reservation.

It appears that for many years prior to the passing of the said Act, and down to the time of this contest, the lords and ladies of this manor have regularly appointed gamekeepers for the manor, and deputations of such gamekeepers have been duly registered at the office of the clerk of the peace for the said county of Lincoln; and the gamekeepers so appointed have shot over the ancient inclosures and freehold lands in the manor as well as over the wastes. It further appears that, about the year 1806, the then lord of the manor was in the habit of shooting over the freehold lands within the manor as well as over the waste lands, accompanied by the gamekeeper of the manor, and that his right to do so was not contested. Permission was also given by the lord or the steward to persons to shoot over the freeholds within the manor, and the persons to whom permission was thus given were allowed to shoot without interruption. It was, however, fully admitted in the argument before us that the claim to a right of free warren or to any right of sporting over the freeholds and ancient inclosures could not be maintained, and that the right of the lord of the manor was confined to the right of sporting over the waste as incident to the ownership of the soil; and the question became limited to the right of the lord in respect of the wastes allotted under the Act as preserved under the reservation clause. This being so, the question in dispute appears to me to be free from difficulty. The land having been allotted as freehold, the ownership must carry with it all the incidents which ordinarily attach to a freehold interest, unless, by the special provisions of the Act, some right has been reserved to the lord which would derogate from the ordinary rights of ownership in the soil; and the question turns, therefore, entirely on the effect of the reservation clause. Now, by the express terms of the Act, the allotment

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to the lady of the manor is to be in bar of and satisfaction for all rights of common and other rights and interests whatsoever over and upon the said lands and grounds hereby directed to be divided and inclosed, except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns. Then the right of sporting reserved is expressly stated to be "the right of fishing and liberty of hawking, hunting, coursing, fishing, and fowling, within the said manor," and "all matters and things whatsoever to the said manor or to the lord or lady thereof incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors." It appears to me that the effect of the clause which, being in derogation of the right of freehold given by the Act to the allottees of the lands inclosed, must, I think, be construed most strictly against the party claiming under it, is simply to preserve to the owner of the manor such rights as were of a manorial character; that is to say, were in the lord quâ lord of the manor, and not as owner of the soil of the wastes. Had the intention been to reserve to the lord the right of sporting over the waste lands when inclosed under the Act, nothing would have been more easy than to say so in terms as was done in the inclosure Act under which the case of *Graham* v. *Ewart* (1) arose. No doubt the reservation clause in the present Act, however general may be its terms, copied probably from some other Act without considering how far the language might be applicable to the manor in question, was intended to have some effect, and to preserve a right of sporting to the lord. But I cannot think, from its terms, that it was the right of sporting as incident to the ownership of the soil of the waste lands that the framers of the Act had in view. At the time the Act passed, it was believed that the lord had, as lord, the right of sporting over all lands within the manor. There existed at that time of day, quite independently of any right of free warren, a general notion that the lord of a manor had the right of sporting over all lands within the manor, whether freehold or otherwise; a belief which, however, had no foundation in law. "We all know," says Mr. Justice Bayley, in *Pickering* v. *Noyes* (2), "that a very mistaken notion long prevailed, that the lord of a manor had a right to go, not only over his own lands, but over the lands of others within his manor." "In the West Riding of Yorkshire," says Baron Martin, in *Bruce* v. *Helliwell* (1), "an idea prevails that lords of manors have a right and liberty of hawking, hunting, coursing, fishing, and fowling analogous to that of free warren or free chase. But the notion is erroneous. They have no such right." Mr. Christian, in his Notes to Blackstone, book 2, c. 27, p. 418, says that this notion, which he terms a very erroneous one, has probably arisen from the Acts of Parliament, from 22 & 23 Car. 2, c. 25, downwards, which, for the preservation of game and for preventing unqualified persons from sporting, have empowered lords of manors to appoint gamekeepers, with power to seize guns, dogs, nets, and engines kept by unqualified persons for the destruction of game.

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(1) 11 Ex. 326; 25 L. J. (Ex.) 42.

3 Jur N.S. 763

(2) 4 B. & C. 648.

It was believed that the lord of the manor of Messingham possessed such a right, and I cannot doubt that it was with the view of preserving such a right, and not with reference to any right as incident to the ownership of the soil in the wastes of the manor, that the reservation clause in the present Act, so far as it relates to the rights of sporting, was passed. And as soon as it is admitted that no such right existed independently of the ownership in the soil, the reservation appears to me altogether inapplicable, and, so far as regards any right arising from such ownership, as of no effect. In this respect the present case appears to me clearly distinguishable from that of *Ewart* v. *Graham* (2), in which there was an express reservation of "all rights of hunting, shooting, fishing, and fowling in the stinted pastures," which was the land about to be inclosed. In the present case there is no reservation of the previously existing right of sporting over the waste lands about to be inclosed, but only of a general right inherent in the lord as incident to the manor, which right failing, the reservation fails to have any effect; and this appears to me to result not only from the language of the reservation clause, but from the preceding provision that the allotment to the lady of the manor shall operate to extinguish all her rights and interests in the waste except the rights of a "manorial" character afterwards to be reserved. If authority were wanting for the view I take of the case before us, the case would, I think, come within the principle of the decision in *Greathead*

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(1) 5 H. & N. at p. 620.

(2) 7 H. L. C. 331. 5 Jur. N.S. 773.

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v. *Morley* (1), in which, under an inclosure Act, there was a reservation of "free warren and liberty of hunting, hawking, fishing, and fowling, &c., matters and things to the manor, or to the lord, or to the lords thereof for the time being incident, belonging, or appertaining in as full, ample, and beneficial a manner as if that Act had not been made." Tindal, C.J., in giving judgment, says, "We are of opinion that the right of hunting or fishing over the allotments of the manor or common is not reserved to the lord of the manor by the saving clause of the inclosure Act set out in the plea. It is the manifest object of the clause to save to the lord all those manorial rights which he possessed before the inclosure as lord of the manor, other and except the right to the soil. The saving clause gives no new royalty or manorial right to the lord which he did not possess before; it only reserves such as he was before entitled to. If he had no market or fair before, if he had no right of free warren before, it is needless to say the clause referred to conveys none. So, if before the Act passed he had no liberty of hunting, hawking, fishing, and fowling over the moor or common 'to the said manor, or to the lord thereof incident, belonging, or appertaining,' he acquires no such right under the clause in question. Now, it would be against all legal construction to hold that the power of the lord of the manor to hunt or shoot over a waste or uninclosed common within his own manor was merely a 'licence or liberty' incident to him as lord; it is a mode of direct enjoyment of his own property. The soil of the waste or common is his, subject only to the right of the commoners to take the herbage by the mouths of their cattle, and the right in the lord to walk or ride over it in every direction, and at all times, is the same right which he has over his other demesne lands, and not a mere liberty or easement. The statute, if it had intended to grant the new lord a new liberty or licence of this nature, after the soil had become the property of those to whom it was allotted, would have employed proper words to create such new liberty or easement." The reasoning of the learned Chief Justice appears to me directly in point to the present case. By the Act the allotment is to extinguish all rights or interests in the soil, with an express reservation of manorial rights only. The reservation is of the "liberty" of hunting, &c., within the manor—a term inapplicable to a right incident to the ownership of the soil, and the observations of Tindal, C.J., on the omission of any direct reservation of the right of sporting over the lands withdrawn from the ownership of the soil are equally applicable here. It is true that when the case of *Graham* v. *Ewart* (1) was before the Court of Exchequer Chamber, the Court of Exchequer having, in the first instance, decided in favour of the defendant on the authority of the foregoing case of *Greathead* v. *Morley* (2), the authority of that case was impugned, and by the majority of the judges (Erle and Willes, JJ., dissenting) overruled as applicable to the case before the Court. But the overruling of the case of *Greathead* v. *Morley* (2) was wholly unnecessary to the decision in favour of the plaintiff in *Graham* v. *Ewart* (1); and when the latter case was before the House of Lords (3), on appeal from the Exchequer Chamber, though the judgment of the Exchequer Chamber was affirmed, neither of the learned lords who concurred in affirming the judgment went the length of overruling *Greathead* v. *Morley* (2), but, on the contrary, they distinctly say that the case before them is distinguishable from it, and uphold the judgment of the Court below on the ground of a clear reservation of the right of the plaintiff, as if still owner of the soil. Lord Campbell says, "Great stress has been laid on the case of *Greathead* v. *Morley*. (2) I do not at all mean to say that the case was not well decided. I give no opinion upon that. I am not called upon to give an opinion upon it. I think it is clearly distinguishable from the present. I am bound to express my own opinion that it is clearly distinguishable. According to *Greathead* v. *Morley* (2), the language of the reservation was uniformly, as it seems to me, confined to manorial easements. Here there is an express, absolute, and unqualified reservation, which, I think, clearly reserves this right to Sir James Graham, as if still owner of the soil. For these reasons, my lords, I must advise your lordships that this judgment should be affirmed." Lord Brougham says, "I entirely take the same view as my noble and learned friend. Without being called upon to give any opinion whatsoever upon the case of *Greathead* v. *Morley* (2), I will only say that I think it may be

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(1) 3 M. & G. 139.

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(1) 1 H. & N. 550; 26 L. J. (Ex.) 97. 3 Jur N.S. 163.

(2) 3 M. & G. 139.

(3) 7 H. L. C. 331. 3 Jur N.S. 773

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perfectly well decided. I do not say that it is not, but it is clearly distinguishable, upon the ground stated by my noble and learned friend, from the present case. I am therefore of opinion that your lordships ought to give judgment for the defendant in error." Lord Cranworth says, "My lords, I take exactly the same view of this case with my noble and learned friends. With respect to the case of *Greathead* v. *Morley* (1), I must make this observation. Either this case is distinguishable from it, or else the decision in that case, in my opinion, was wrong. We need not say which of these two alternatives we think the right one; and it would be improper for us to say that we overrule a case which possibly may be distinguishable from the present. But, if not distinguishable, I have no hesitation in saying that the case was wrongly decided. Here, after what is called the saving clause, there is an express enactment that Sir James Graham, his heirs, and assigns, shall at all times hereafter enjoy the right of hunting, shooting, fishing, and fowling in and through and over the said stinted pasture and every part and allotment thereof." Then the noble and learned lord proceeds to point out that the difficulty in that case arises from the seigniorial rights having been in the same clause reserved to the lord, and to this having been stated in the case, but he observes "it was evidently no seigniorial right." "I am very glad," he says, "that the form in which this case was put for the opinion of the learned judges raises what is the real question, viz. that there was no other right than the right which arose from the defendant in error being the owner of the soil." Lord Wensleydale says, "I entirely agree with my noble and learned friends that the judgment ought to be for the defendant in error. I entirely adhere to the opinion which I gave in the Court of Exchequer, in which all of us concurred, that in this case there was a reservation of the de facto right to Sir James Graham. The only part of that judgment as to which I have any doubt is, whether this case can be distinguished from the case of *Greathead* v. *Morley* (1), but I adopt the alternative of my noble and learned friend opposite, that either it can be satisfactorily distinguished, or that the decision is wrong."

The result, then, of their judgment is that Lord Campbell and Lord Brougham expressly decline to overrule *Greathead* v. *Morley* (1); Lord Cranworth and Lord Wensleydale only so far overrule it as the ratio decidendi may be applicable to the case before them, while all the four law lords concur in saying that the case before them was plainly distinguishable from the case in the Common Pleas, the reservation in the latter having been of seigniorial rights, while in the case in the House of Lords there was a direct and express reservation of the right of sporting over the land to be inclosed. The House of Lords having declined to overrule *Greathead* v. *Morley* (1) as applicable to such a case as the present and having clearly held that the overruling of that case in the Exchequer Chamber in *Graham* v. *Ewart* (2), was unnecessary to the decision of the case, it must be looked upon as extrajudicial, and I therefore feel at liberty, sitting in a Court of Error, to treat *Greathead* v. *Morley* (1) as not overruled, and to express my concurrence in the reasoning and conclusion of Tindal, C.J., in the Court of Common Pleas, as to my mind more cogent and satisfactory than those of Wightman, J., in *Graham* v. *Ewart*. (2) Independently, however, of authority, I arrive at the conclusion that nothing short of a positive reservation to the lord of the right of sporting over the inclosed lands, if not in express terms, at all events in language necessarily leading to such a conclusion, will suffice to entail on land allotted as freehold a burden of a feudal and onerous character inconsistent with the ownership in fee. I agree with what is said by Baron Bramwell in *Lord Leconfield* v. *Dixon* (3), that the reservation of such a right to the lord is contrary to the policy of the inclosure Acts. The policy of the legislation on this subject has been to cause the reclaiming of waste lands, and the making them available to the purposes to which landed property is capable of being applied. The inconveniences of such a reservation are there forcibly pointed out. "It should be remembered," says Baron Bramwell, "that the right now claimed by the plaintiff is inconsistent with the useful design of the statute; which was that the lands affected should be held in severalty with a plenary proprietorship unfettered by the rights of others over them. There is no doubt that this is most for the public interest. If the plaintiff's claim is well founded there is no use to which the defendant can put his lands without their being subject to the claim. He could not build a house and have a garden or lawn without the privacy of the occupier being liable to intrusion by the plaintiff in search of game." I am therefore prepared to hold that nothing short of a clear recognition of a right of the lord to take the game in what becomes alienum solum will suffice to preserve this right, and that the mere reservation of manorial rights, properly so called, will not have this effect. In the present instance, we have only a reservation of manorial rights; and it is not because the parties have intended to preserve a right as incident to the manor which turns out to have had no existence, that we can give effect to this intention by holding the reservation to apply to a right which was not in the contemplation of the parties and which was not a manorial right at all, but simply a right incident to the ownership of the soil, and which therefore was not in the lord as a manorial right. I am therefore of opinion that the decision of the Court of Common Pleas was right and should be affirmed, and in this judgment my Brothers Mellor and Amphlett concur.

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(1) 3 M. & G. 139.

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(1) 3 M. & G. 139.

(2) 1 H. & N. 550. 3 Jur NS 163

(3) Law Rep. 2 Ex. 202.

BRAMWELL, B. If I had to say what was the intention or object of the draughtsman in the clauses beginning "Nothing herein contained shall prejudice, &c.," I should say he found certain words had been commonly used either for preserving some right which otherwise would be lost, or for avoiding a question of whether it was lost, and so put them in to serve the same purpose here, believing that they would at least do no harm. And I should say that most certainly he never put them in to save or confer the right of sporting claimed by the defendant. That his object was what I suggest seems manifest from the words used. There is a whole string of words many of which are probably, and certainly one is, inapplicable and useless. There is no fishery probably, no fairs, marts, markets, or stallages, and probably no right to the goods and chattels of felons and fugitives, felons of themselves, and put in exigent, treasure trove, waifs, estrays, and forfeitures; these words and the general words "matters and things" satisfy me the object of the draughtsman was what I have mentioned. That it was not the object to save or confer the right of sporting claimed I am satisfied from the inappropriateness of the language used.

The claim is of an exclusive right to take and destroy all game, and also I suppose all other edible birds, as plovers, quails, &c., and rabbits; also I suppose the exclusive right of hunting foxes and destroying other vermin. This was delicately put forward, but it is the claim made, viz. a title to a right of sporting which was territorially possessed before the inclosure. Is it conceivable that a man who wished to save or confer that right would have contented himself with using such terms as "liberty of hawking, hunting, coursing, and fowling within the manor"? No such words as sporting, shooting, taking game and rabbits, no word of "right," no word of exclusion, but the old fashioned words "hawking and fowling," and the useless ones as a matter of profit of "hunting and coursing." I have no doubt no such idea was in the head of the draughtsman as is suggested. Had there been he would have used such words as appear in *Graham* v. *Ewart.* (1) If, however, it could be proved to me there was some such idea, then I should say it was this: that, thinking there was some right in the lord of the manor as such over land "within the said manor," he meant that it should extend, such as it was, to the new inclosures. I am satisfied, as I have said, that he had no such idea; but if he had and used these words to carry them into execution, then he only saved or conferred the same right over the new as existed over the old inclosures, and that is none. If it was a doubtful right, then the allotments were on the footing that it was doubtful, more to the tenants than if it was certain that there was no right, less than if it was certain there was a right. But we are not called upon to say what the draughtsman intended. The question for us to decide is what intention he has expressed, what is the meaning of the words he has used. In construing these words we may well take into account the general intention of the statute and the probabilities. The intention was to allot the land in severalty, free from rights interfering with its use in such way as the owner thought most beneficial. But, according to the argument of the defendant, this intention was only partially carried into execution, for a right of sporting was given to the lord over every allotment. The freeholder is not at liberty to sport on his own land, nor to destroy hares or rabbits, however mischievous or however incon-

(1) 11 Ex. 326; 25 L. J. (Ex.) 42. Jur N.S. 103.

sistent with the most profitable use of it, but is subject to the right, well called odious, of having his freehold invaded by the lord or those whom he may license with any number of beaters and helpers. May the allottee build a house, or erect a brick wall, or lock a gate to his freehold? It is in vain to say ordinary farming tenants are subject to this right. So they are to pay rent. They take their farms on those terms or leave them alone. They pay rent accordingly, and the feeling is different in the case of a freehold. The right claimed is in my judgment injurious and objectionable, and consequently one not likely to have been conferred by the legislature. Let us see if it has been. The burthen of proof is on the defendant. The right of sporting was territorial, an incident of the property in the soil. When the property was transferred to the allottee this right went with it, unless the defendant can show it was saved to or conferred on the lord. I might content myself with saying I have heard nothing to shew that has been done. But, further, I think I can shew negatively that it has not been. The statute says that the lands allotted are vested in the allottees in lieu of and satisfaction for all rights of common and other rights and interests over and upon the lands, except such manorial rights as are hereinafter reserved to Margaret Walker, her heirs, &c. The statute reserves and does not pretend to create a right, and the rights it deals with it calls "manorial." It afterwards proceeds thus: "Nothing shall prejudice, &c., the right of the said Margaret Walker or any lord of the manor of in or to the seigniory or royalties incident or belonging to such manor." This is the reservation clause, and if it stopped there it is clear that nothing but seigniory or royalties would be reserved, but it goes on to explain what it means by "manorial rights" and "seigniory or royalties;" introducing the explanation by the words, "but that the said Margaret Walker, and all succeeding lords of the manor shall enjoy rents, &c., and liberty of fowling, &c., within the manor." Now this which is meant to explain ought not to extend the meaning of the words "seigniory or royalties." It then enumerates what it has thus called manorial rights and seigniory or royalties. The clause is merely to preserve whatever was in the nature of a seigniory or royalty. The words "if any" must be read in that enumeration as it is certain there was no right of fishing. Now these rights, if any, are certainly not all manorial; that is to say, some might be held when there was no manor, or by other than the lord. But they are all of a manorial character, or such as often belong to the lord of the manor, like a seigniory or royalties, and are none of a territorial character. It is needless to enumerate them. Moreover, they are all spoken of as to the said manor, or lord or lady thereof, incident or belonging, or which have been heretofore held by Margaret Walker or any of her ancestors. These words clearly govern the whole sentence, and not "matters and things" only. They are, therefore, things incident to the manor or belonging to her as lady thereof. If the matter rested here there would scarcely, as I think, be a word to be said for the defendant. But then it was said that the words "other than and except such common right as could or might be claimed by the said Margaret Walker, as owner of the soil and inheritance of the said common," shew that something different from and more than a reservation of manorial rights was intended. What was meant I might fairly say I do not know; many meanings might be and were suggested. But the argument proves too much. It is this: the draughtsman supposed that the lord of the manor had a right of common in his own soil: this he meant should cease, therefore he did not mean others should. Well, but what then? Why, the logical conclusion is that all others remain, including the right to the soil, right to trees, gravel, and stone-pits, cutting furze or gorse, &c. But that is absurd. But if none of these territorial rights are preserved, why is the territorial right of shooting? no reason can be given. So that this argument, based on the assumed ignorance of the legislature, fails. I will not repeat the arguments I used as to the probable intentions of the draughtsman, nor those I have used in former cases. I abide by them. If the defendant here succeeds the almost ludicrous consequence will follow that the lord will have a greater right in the new than in the old inclosures. For, with great respect to my Brother Honyman, the liberty is not limited to the old inclosures. *Bruce* v. *Helliwell* (1) is not distinguishable, and Mr. Field admits that was well decided. The Exchequer Chamber in *Lord Leconfield* v. *Dixon* (2) did not dissent

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(1) 5 H. & N. 609; 29 L. J. (Ex.) 297.

(2) Law Rep. 3 Ex. 30.

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from it. As to the latter case, I retain the opinion I expressed in the Court below, which was overruled but, as I think, with all humility, not answered. Though the opinion of the Court is expressed, no reason is given for that opinion. I say this with great respect, but deem it my duty to notice it to account for not acquiescing in the judgment. It is added that the words are stronger than in *Ewart* v. *Graham* (1), although there the right was expressly given on the new inclosures. But the case is distinguishable, as in the judgment the general Inclosure Act is relied on, which was not in force when the statute governing this case was enacted. Moreover, the judgment says the case cannot be distinguished from *Ewart* v. *Graham* (1), which I cannot but think a mistake. In the court below Mr. Justice Honyman says that *Lord Leconfield* v. *Dixon* (2) is not an authority bearing on this case. He also thinks *Ewart* v. *Graham* (1) not distinguishable from this case. I must therefore think that he considered himself bound by authority, and if he had not considered himself so bound he might have construed the statute differently. Then there is the case of *Greathead* v. *Morley* (3), as to which I avail myself of the observations of my Lord. I think the judgment should be affirmed.

Cleasby, B. It appears to me that the only mode in which fair effect can be given to the words of this Act of Parliament is by holding that, after it was passed, the lady of the manor retained the same right of shooting over the wastes of the manor which she possessed before. Only two views can, as far as I can see, be taken of the enactment in question. Either it was passed upon the idea that she possessed some defined right, such, for example, as that of free warren, and intended to reserve that particular right, or without having reference to any particular right which might be uncertain and not exactly known or agreed to, it might leave that open and still reserve everything which could properly be called a right which she actually possessed and enjoyed.

With regard to the first view, if I could be satisfied that the legislature,—or which is the same thing, the parties, that is, the commoners and the lady of the manor,—had in view a particular right such as I have mentioned, I think as soon as it appeared that such right did not exist before, there would be an end of the question; the enactment would be inoperative. To give it in that case any operation would be to make a fresh Act of Parliament or agreement by making it apply to something not intended, which is not the province of a court of justice to do.

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(1) 11 Ex. 226; 25 L. J. (Ex.) 42. 3 Jur N.S. 163

(2) Law Rep. 3 Ex. 30.

(3) 3 M. & G. 139.

But I cannot satisfy myself, from the language of any part of the Act of Parliament, that this was the case. Before considering the first question, viz. whether the enactment in question upon the face of it has reference to some particular right, distinct from that possessed and enjoyed by the lord, of sporting over the wastes and possibly over the old inclosures in the manor, it is requisite to consider what the position of lords of manors was, and whether they stood in a different position from mere owners of land.

It is quite unnecessary to enter into the question of the original right of the Crown to take all animals feræ naturæ, in which there was no right of property, and whether originally no man could do it without some grant from the Crown, such, for instance, as a right of free warren, as to which Blackstone may be consulted, vol. ii. p. 38 (ed. by Stewart), because all questions connected with the right must be decided upon the effect of the numerous statutes on the subject.

Those statutes had reference to the right to preserve and kill game, and to the qualification which was required. The necessity for a qualification was abolished by 1 & 2 Wm. 4, c. 32. But my object in referring to the earlier statutes is to shew that lords of manors were regarded as standing in a different position from other persons as regards the right of sporting over the manor. The difference was not sufficiently adverted to upon the argument. It is only necessary to refer to the statute 5 Anne, c. 14, an Act for the better preservation of game, which empowers lords and ladies of manors to take within their manors game from the possession of unqualified persons, and to take guns, dogs, and nets, and also to appoint gamekeepers to kill game for the use of such lord or lady; and the statute 1 & 2 Wm. 4, c. 32 (which being passed subsequently to the Act in question, is only important historically as being founded not upon new, but upon old, ideas), is to the same effect. The 13th section enables lords and ladies of manors to appoint gamekeepers, and confers upon such gamekeepers the right to seize for the use of the lords nets, &c., used for taking game within the limits of the manors by persons not authorized to take game. The same Act in many sections deals with the right to kill game as something distinct from the ownership of the soil. The words "right of killing game whether enjoyed by the landlord or other persons" are frequently used, and that separate right is made the subject of legislation. Without referring further to the statutes, it is sufficient to notice the case of *Calcraft* v. *Gibbs* (1), decided in 1792, the Act in question having been passed in 1798. It was an action for a penalty under the Game Laws for sporting without a qualification. The qualification set up was a deputation as gamekeeper under a person who, it was said, had purchased the right of shooting over the manor. But this was held to be no answer, there being no bonâ fide dispute as to who was lord of the manor. If there had been such a dispute it could not have been tried in an action for a penalty, but there being no dispute, it was said the lord of the manor was the only person who could grant the deputation as the law then stood. The words of Lord Kenyon are: "Now that decides the question at once; for a man cannot convey to another the power of appointing a gamekeeper without a conveyance of the manor itself. Such a power is a mere emanation of the manor and inseparable from it."

The clear effect of the legislation on the subject and of the authorities was, it is submitted, that the lord had certain rights connected with the preservation and taking of game which was regarded as inseparable from the manor, and therefore as a manorial right. The extent to which the lord had the exclusive right of sporting has nothing to do with this. It might be over the whole manor, or it might be over the wastes, and particular inclosures, or it might be a subject of dispute whether it existed beyond the wastes of the manor, and to what extent. Mr. Christian, in his note to Blackstone, vol. ii. p. 408, says that the power of lords of manors to appoint gamekeepers had led to the inference (which he considers as erroneous) that lords of manors had a right to take game throughout the manor superior to that of other duly qualified owners of land within the manor. Having regard to the position of the lords of the manor at the time when the Act was passed, we may now consider whether it appears that the Act of Parliament in the various clauses is intended to preserve some right to the lord which did not exist. It was suggested that the language of the Act was used upon the supposition that the lady of the manor had some such distinct right as a right of free warren which it was intended to preserve, and as it is now conceded that there was no such right as that of free warren, that the enactment was inoperative.

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(1) 5 T. R. 19.

Upon reading the various clauses of the Act, I see no reason whatever to conclude that they had reference to any such particular right independent of the general right of the lord of the manor. By the first clause there is to be an allotment to the lady of the manor of a certain portion of the wastes in lieu and in full compensation for her right and interest in the soil of the commons and waste grounds, and in the section which follows we have the effect to be given to the allotment. By that section, the allotment to each allottee, including the lady of the manor, is made a satisfaction for all his or her rights over all the wastes, with the following exception: "except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns." A right of free warren does not come within the description of a manorial right at all. It is a franchise to which title must be made either by grant from the Crown or by prescription, and may be held just as well by a person not lord of a manor as by one who is. It is so separate from the manor, that when the lord of a manor has also acquired a right of free warren over the manor and conveys away the manor with all rights of fishing, fowling, hunting, and shooting belonging to it, this would not carry the free warren, because, though the words "all rights, &c.," are large enough to include a free warren, yet the warren does not belong to the manor, and therefore does not pass. This was expressly decided in *Morris* v. *Dimes.* (1) In that case Littledale, J., says: "Whether these words be sufficient to include a free warren I will not inquire; the grant is only of things belonging to the manor, and the warren was distinct from the manor, and therefore it will not pass by the release." It may no doubt be by prescription or by the term of the original grant, like any other profit à prendre or easement, appurtenant to the manor, so as to pass by a conveyance of the manor with all its appurtenances, but that does not make it any more than any other such profit or easement a manorial right, so that this exception of manorial rights could not by any natural conclusion be held to have reference to such a right as has been mentioned. As regards the reservation and enacting clause which follows, and which is referred to in the 2nd section, it contains general words including all rights of hunting, fishing, and fowling, and all franchises or privileges, and every right which could be enjoyed by the lady as lady of the manor, and therefore would no doubt include a free warren if such a franchise had become appurtenant to the manor, but coupling these general words with the more particular words of the exception to the preceding clause which refers to them, it seems impossible to contend that the whole enactment so clearly refers to a supposed right of free warren, which did not exist, to the exclusion of any more limited right which did exist. Applying, however, the whole of the enactment to the state of things which did exist, we must consider what the state of things was. Mrs. Walker was lady of the manor, with the usual right of appointing gamekeepers, of granting deputations for the manor, with the exclusive right of sporting on the wastes of the manor. She might have or might not have the right of sporting over old inclosures, although the inference deriveable from the Act is that she had not, or, at all events, that it was not admitted by the parties to it that she had, any right beyond that over the wastes, because the exception in the 2nd section only refers to the rights over the wastes, and it refers to the subsequent enactment as carrying into effect the previous exception. The effect of the enactments as applied to what was undisputed appears to be, that the allotment clause excepts the lady's rights over the waste, and the enactment clause contains words carrying into effect the exception, and we ought to give it this operation by applying it to what did exist rather than make it inoperative by supposing it to apply exclusively to something which did not exist; the only real question appears to be whether, in any fair sense of the word, the lady of the manor can be said to have any right of sporting over the wastes. There is perhaps some want of strict accuracy in speaking, without some explanation, of the right of the owner of the soil to the exclusive sporting on his own land, although it should be borne in mind that the owner of land has not necessarily the exclusive right of sporting over it. There may be a right of free warren in some other person, or he may himself have granted away the exclusive right of sporting. But even if there is some want of strict accuracy, the only question is, whether what is intended is clearly understood, and it has been so common a thing to have the right to the land and to use it for the ordinary purposes of occupation in one person and the privilege of sporting in another, the latter privilege being one of the most common subjects of bargaining in all parts of England, that even before it has become, properly speaking, a separate right it is spoken of as such. It may never have existed in the time of the owner for the time being except as a separate right. It may always have been let either for terms of years or from year to year, and it may be under demise at the time when the lord and the commoners come to the agreement for the inclosure. And as to its coming within the words "manorial rights," enough has been said to shew how much the rights of lords of manors in relation to game were and are treated as manorial rights. I will only add, that, supposing the lord of a manor having always enjoyed the exclusive right of sporting over the wastes of the manor, and having made it the subject of profit by letting it from time to time, the commoners were to meet for the purpose of settling the terms of the inclosure, and there was to be an agreement to the effect that the allotment to the lord should be in satisfaction of all his rights over the wastes, would it not be considered that he had given up all his rights, including that of sporting? And on the other hand, that, if the agreement was that the allotment to the lord should be in satisfaction of all his rights over the wastes, except the manorial rights afterwards mentioned, and the right afterwards mentioned was that of sporting, along with certain other rights, then the right of sporting would be reserved. It is only a question of intention, and the intention, I submit, would be obvious. It was said that there was a difficulty upon this construction in giving effect to the exception in the 3rd clause, which excepts out of the reservations,

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(1) 1 Ad. & E. 654.

"such common right as could or might be claimed by the said Margaret Walker as owner of the soil and inheritance of the said commons or waste grounds." The words "such common right as might be claimed by the lady" are inartificial, because the common right would be claimed by the commoners, and the lady would have no right as owner of the soil with the commoners. If this had applied to her right in respect of tenements on the manor, her property, it would be correct, but the language applies it to the wastes. The lord would have no right as a commoner; but he would have a right to stock the common as owner of the waste, provided enough was left for the commoners, and in that general sense he may be said to claim a common right with the others, to which the language might apply, for the lord receives compensation by his allotments not only for his giving up the ownership of the soil, but also for his losing the benefit of stocking the common. At any rate, the words "common right" cannot, by any straining of language, be held as referring to the lord's exclusive right of sporting so as to except it. As regards the distinction which is drawn between territorial and manorial rights, I beg to be allowed to say that all manorial and seigniorial rights are in any proper use of the word territorial; and what are manorial rights? Without regard, therefore, to any authorities, I should come to the conclusion that there is nothing to prevent effect being given to the language of this agreement, or rather Act of Parliament, and that the clear effect is to reserve to the lady of the manor the exclusive right which the lady actually possessed and enjoyed of sporting over the wastes of the manor. It would occupy more space and time than I should be justified in appropriating if I were to examine the several authorities which were referred to. Decisions upon the language of an agreement or Act of Parliament are seldom of much service in construing another. But the decisions are of importance, shewing, as they do, that the exclusive right of sporting by the owner of the land, though, properly speaking, not a separate right from the ownership, becomes so in the construction of agreements and Acts of Parliament, if the language shews that it was intended to be made so.

Thus the reservation of the exclusive right of sporting if occurring in a deed between parties executed by the grantee of the land, would be given effect to as a grant by the grantee: *Wickham* v. *Hawker* (1); and if occurring in an Act of Parliament, it would be operative to the same extent: *Ewart* v. *Graham.* (2) This last case resembles the present so much that Mr. Justice Honyman regards the decision as conclusive of the present case. And, bearing in mind that the enactment of the 2nd section is that all the lady's rights over the waste are satisfied by the allotment to her (except the manorial rights afterwards reserved), which necessarily imports that "the rights afterwards mentioned," include rights over the waste, it appears to me that Mr. Justice Honyman's view was correct, and that the case of *Ewart* v. *Graham* (2) is in point. I should agree, as a matter of construction and upon the authorities, with my learned Brothers in their conclusion if the language of the exception in the 2nd section did not necessarily import that the rights over the waste were intended to be reserved; but this exception appears to me to be the decisive feature of the case. Unless proper effect is given to this, it is not too much to say that the intention of the parties introducing this exception is disregarded. The 1st section must be read in connection with the 2nd section, and the 2nd in connection with the 3rd. It appears to me that the judgment in *Ewart* v. *Graham* (2) removes the principal objection which could be made to the decision at which I have arrived; because it was conclusive that in an inclosure Act a reservation to the lord of all right of hunting, shooting, fishing, and fowling over the waste in as full a manner as he would have enjoyed it before, carried not only any right, properly so called, which he might possess separate from the soil, but the benefit and privilege which he in fact enjoyed as owner of the soil. That decision was arrived at upon the principle which, it is submitted, is the only true one of carrying out the intention of the parties to the agreement.

Decisions had been arrived at before, and some were already overruled, which appeared rather to satisfy particular views than the terms agreed on. It was stated in the course of the argument before us, that, in order to arrive at the conclusion which I have come to, it was necessary to overrule the case of *Bruce* v.

(1) 7 M. & W. 63.

(2) 7 H. L. C. 331; 29 L. J. (Ex.) 88. 5 Jur. N.S. 773

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Helliwell (1), in the Exchequer. But that is not so. There is in that case an express exception out of the reservation clause of such rights as could or might be claimed by the lord as owner of the soil and inheritance of the common. There is no such exception here. The language in that case seems clearly to have expressed the intention that the rights over the waste should be extinguished. I believe the conclusion I have arrived at is not inconsistent with *Bruce* v. *Helliwell* (1), or with any case which has not been overruled, and that it only reserves to the lady of the manor the same rights as are reserved by the landlords in England generally when they lease their lands. Dealing with the present case as a question of intention, I should say that the only sound argument is that the words "manorial rights" in the exception to the 2nd section did not include the exclusive right of the lord to sport over the waste. If it appeared that there were other manorial rights over the waste to which these words were intended to apply, there might be some force in the argument, but as there are no others, what else could the parties intend by those words? and although the words might not properly describe such a right taken by themselves, enough has been said, I hope, to shew that there is nothing so inappropriate in them as to make it impossible for them to be construed as including the only thing to which the intention of the parties could apply them.

It is because I am satisfied that this judgment carries into effect the intention of the parties to this arrangement of rights in 1798, that I venture to differ from the Lord Chief Justice and many of my learned Brothers. I think, for the above reasons, that the judgment of the Common Pleas ought to be reversed.

In this judgment my Brother Baron Pollock concurs.

Judgment affirmed.

Attorneys for plaintiff: *Scott & Co.*
Attorneys for defendant: *Pilgrim & Phillips.*

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(1) 5 H. & N. 609; 29 L. J. (Ex.) 297.

[IN THE EXCHEQUER CHAMBER.]

1874
June 24.

ELLIS *v.* THE GREAT WESTERN RAILWAY COMPANY.

Negligence, Evidence of—Railway Company—Level Crossing.

9 Ex D 39

A public footway crossed a railway on a level. The plaintiff while crossing on the footway in the evening, after dark, was knocked down and injured by a train of the defendants on the crossing. He stated in evidence at the trial, that he did not see the train until it was close upon him; that he saw no lights on the train and heard no whistling. He stated also, that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called on behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in the defendants' employ also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross.

The judge at the trial ruled that there was evidence to go to the jury of negligence on the part of the defendants which caused the injury to the plaintiff:—

Held, on a bill of exceptions, by Bramwell, B., Mellor, J., Pollock and Amphlett, BB., (Cockburn, C.J., and Cleasby, B. dissenting), that there was no evidence of negligence to go to the jury.

Bill of exceptions to the ruling of Grove, J., at nisi prius.

The declaration stated that the defendants were possessed of a railway which crossed on the level thereof a certain public highway, and the defendants negligently invited persons to cross the railway upon the said highway when it was dangerous for them so to do, and improperly and negligently managed their trains on the said railway; and the plaintiff, whilst lawfully using the said highway, and being invited by the defendants so to do, was, owing to the said negligent conduct of the defendants, knocked down by a train of the defendants, and had one of his legs cut off and was otherwise hurt, &c.

Plea: Not guilty. Issue.

The evidence given at the trial was set out in the bill of exceptions, and was in substance as follows:—

The crossing in question was a public footway, much frequented at all times, but not so much on Sunday evenings as on week days. A person crossing there could see along the line in one

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direction towards Dudley, half a mile, and in the other direction towards Wolverhampton, a quarter of a mile. The plaintiff stated that on Sunday evening, the 17th of December, between nine and ten o'clock, he had occasion to cross at the crossing on his road home; that when he got to the crossing he heard a train coming in the direction from Dudley, and waited till it passed; that it was dark, and he could see no light whatever; that he then went straight to go over the crossing, and was not aware that another train was coming up from Wolverhampton; that he did not see it until it was close to him, nor hear it; that he was knocked down by it and injured; that he saw no light on the train, which was coming from Wolverhampton to Dudley, and that he heard no whistling from any train. He also stated that the up and down trains did not generally come together at that crossing, to his knowledge, and that he had crossed once or twice a week for thirty years. He stated that he saw no servant of the company there to give any caution or warning, and that he did not hear any one call out.

The gates for carriages and carts at the crossing were closed, but the hand-gate for foot-passengers was open.

The driver and fireman of the engine, stated that there was a light on the engine, and side lights on the train. That the former could be seen a quarter of a mile off, and the latter, by anyone standing at the crossing and looking, for some distance; and that the whistle was sounded before starting from Prince's End Station, about a quarter of a mile from the level crossing. It was admitted by the fireman that lamps sometimes blew out, and that though the lights were in at Wolverhampton, he could not swear whether they were in at Prince's End or at the crossing.

A railway porter, in the employ of the company, whose business it was to watch the crossing at night, to keep people from running into danger, swore to being at the crossing on the night in question, and having called out to the plaintiff to keep back when the train was coming. This witness was cross-examined by plaintiff's counsel, to shew that his statement was not to be relied on, and that he had said afterwards that he did not think the plaintiff heard him call out, and a witness was called to shew that he had said so, and to contradict him in other particulars. The learned judge ruled that there was evidence to go to the jury of negligence on the defendants' part producing the injuries to the plaintiff, which ruling was excepted to.

The jury found for the plaintiff, damages 350*l*.

Manisty, Q.C. (with him *J. O. Griffits*), for the defendants. There was no evidence of negligence on the part of the defendants to go to the jury. There was nothing exceptional in the character of the line at the place where the accident happened, as in the case of *Bilbee* v. *Brighton Ry. Co.* (1), and the case comes within the authority of *Cliff* v. *Midland Ry. Co.* (2) *Stapley* v. *Brighton Ry. Co.* (3) is clearly distinguishable, because there was an invitation to cross in that case, which there was not here.

H. Matthews, Q.C. (with him *G. Browne*). It is laid down by Mellor, J., in the case of *Cliff* v. *Midland Ry. Co.* (2), that in crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway. It was proved that it was quite an exceptional circumstance for the two trains to meet at the level crossing as they did on this occasion. The plaintiff, who had known the crossing thirty years, had never known it occur before. There was no whistling, and there was evidence to shew that there were no lights on the train that knocked the plaintiff down. When the first train passed, he was entitled, under the circumstances, to assume that all was safe. The railway company are bound to take reasonable precautions according to the nature of the crossing. How is a foot-passenger, who has a perfect right to be on the crossing, to protect himself at a level crossing on a dark night if no precautions are taken? There is no question raised with reference to contributory negligence, if any, on the part of the plaintiff.

[He cited *James* v. *Great Western Ry. Co.* (4); *Wanless* v. *North*

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(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182. 11 Jur. N.S. 745

(2) Law Rep. 5 Q. B. 258.

(3) Law Rep. 1 Ex. 21. 11 Jur. N.S. 954

(4) Law Rep. 2 C. P. 634, n.; 36 L. J. (C.P.) 255, n.

Eastern Ry. Co. (1); *Skelton* v. *North Western Ry. Co.* (2); *Stubley* v. *North Western Ry. Co.* (3); *Wyatt* v. *Great Western Ry. Co.* (4)]

Manisty, Q.C., in reply.

Cur. adv. vult.

June 24. The following judgments were delivered:—

Cockburn, C.J. I regret in this case to be obliged to differ from the majority of my learned Brothers; but I cannot bring myself to think that there was not a case made out on the part of the plaintiff, which the learned judge on the trial could not have withdrawn from the jury.

The case must be considered by us quite irrespectively of the evidence given on the part of the defendants. There may have been abundant evidence adduced by the defendants to entitle them to the verdict, but the jury might disbelieve such evidence, and if, independently of such evidence, there was on the plaintiff's evidence a case which called for an answer, it was not competent to the judge to withhold the case from the jury. Now the facts, as stated by the plaintiff, were simply these. He had occasion between nine and ten o'clock on an evening in December to cross the defendant's line where that line crossed the highway on a level crossing. There were gates on each side of the line, which were closed, as is usual, when a train was expected; there was a small gate adjoining through which foot passengers could pass, and which was not kept shut. In crossing the line the plaintiff was caught by a train passing along the line, was knocked down, and very severely injured. There was no light at or near the level crossing by which the plaintiff could see whether the gates, usually closed to prevent carriages from passing when a train was approaching, were open or shut, so as to form a judgment whether a train was likely to pass or not. According to his account he saw no light as of an approaching train, and heard no whistle from the train to intimate to any person crossing the line that a train was approaching. Assuming that the train by which the plaintiff was knocked down had not the usual lights, and that no indication of danger was given by sounding the whistle when the train was coming to where the level crossing was, I am of opinion that it was a question for the jury whether the absence of lights and the omission to sound the whistle did not amount to neglect on the part of the company to take reasonable precautions to prevent accident to a person crossing the railway. The law was, I think, laid down quite correctly by my Brother Mellor in the case of *Cliff* v. *Midland Ry. Co.* (1), which arose upon an accident in crossing a level crossing, where he says: "When parliament authorizes a company to construct a railway and to work it, it is implied in that that the company are to work it in a reasonably proper manner, in the usual way in which railways are worked, and in crossing a footway on a level the company are bound as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway." I entirely agree in the law as thus laid down, and I think that there is no analogy to be derived from the case of ordinary cross-roads or the like. The case must be looked at with reference to the great additional danger to the foot-passengers from the velocity of trains and the fatal consequences of a collision when produced by a train. If, therefore, there was here an absence of the ordinary lights, or an omission to sound the whistle, with which a train is always provided, on approaching the crossing, there was, as I have said, a case for the consideration of the jury. But it is said that the presence of lights, or the sounding of the whistle, is not sufficiently negatived by the plaintiff, who only says he did not see the one or hear the other. But it is in the first place to be observed that there was a total omission of any cross-examination of the plaintiff with a view to elicit from him that there might have been lights which he did not observe, or that the whistle might have been sounded without his hearing it, and though it is possible that he might, by neglecting to look up and down the line, have failed to see the lights of the approaching train though there were such lights, it is difficult to suppose that a man not being afflicted with deafness could have failed to hear the whistle, if the whistle had been properly sounded on the approach of the train. I therefore think that primâ facie the statement of the plaintiff that he heard no whistle was some evidence to go to the jury that the whistle was not sounded.

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(1) Law Rep. 6 Q. B. 481.

(2) Law Rep. 2 C. P. 631.

(3) Law Rep. 1 Ex. 13. 11 Jur NS. 954

(4) 6 B. & S. 709; 34 L. J. (Q.B.) 204. 11 Jur NS. 825.

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(1) Law Rep. 5 Q. B. at p. 261.

It is unnecessary to express my own opinion that as a matter of reasonable precaution, with a view to the public safety, it is the duty of a railway company to cause the whistle to be sounded when a train is approaching a level crossing: it is enough to say that it is a question for the jury whether such is their duty, and whether the omission does not amount to negligence. I am of opinion that that question is one which should be left to a jury; and I am further of opinion that the statement of the plaintiff amounted to primâ facie evidence of such an omission, and that consequently the learned judge was right in not withdrawing the case from the jury.

Mellor, J. I think there must be a venire de novo in this case, as I cannot see in the bill of exceptions any evidence set forth which was proper and sufficient to submit to the jury, to sustain an action against the defendants on the ground of a negligent management of their trains on the night in question. I do not desire to withdraw or qualify anything that I am reported to have said in the case of *Cliff* v. *Midland Ry. Co.* (1) I think that the opinion which I expressed was strictly correct as applicable to the circumstances of that case. The engine which caused the injury was not the engine of any regular train, but was employed in shunting trucks after the regular trains had passed. It was, in fact, an unusual train of trucks, which came without notice across the footway, and I think that whistling as the train approached the footway was obviously so reasonable a precaution, that the omission, under the circumstances, might be evidence of negligence. In the present case there was nothing unusual in the management of the traffic on the night in question. The trains were the usual and accustomed trains passing at the usual and accustomed times, as was admitted by the counsel for the plaintiff.

It is not enough, in order to make out a case to go to the jury, that the party injured did not see a light or hear a whistle. He must give evidence which ought to satisfy a jury that there was something negligent or unusual in the conduct of business on that night. It is, I think, apparent from the evidence, that the traffic had been conducted for a long time in the same manner as it was on that night, and I think that it must be taken that the plaintiff, who stated that he had lived near the spot for thirty years, and crossed at the crossing once or twice a week, was aware that trains coming in opposite directions passed the spot at the same time every night; and I think that the true inference from the evidence on the part of the plaintiff was, that the accident was due entirely to his own want of ordinary care.

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(1) Law Rep. 5 Q. B. at pp. 261, 262.

BRAMWELL, B. I am of opinion that there should be a venire de novo in this case. I think there was no evidence to go to the jury. In my judgment, the road being straight, things on it visible for a quarter of a mile in one, and half a mile in the other, direction, nothing to impede the view or make a difficulty for the foot-passengers crossing the line, nothing was necessary to be done by the defendants. The sight and sound of the approaching trains were enough warning. If not, I cannot see why it should not be held that, when a carriage on a common road crosses a footpath, the driver is bound to blow a horn, or stop, or have somebody at the crossing to warn the foot-passengers. Further, I think that proper precautions are not negatived here by the evidence. I think it is shewn, by the defendants' evidence, that they did not whistle, but it is not shewn that warning was not given. The witness who says he gave warning may be displaced if the contradiction is believed. But that only proves that there is no evidence that warning was given, not that there is evidence that it was not. The only thing relied on for that purpose is the statement of the plaintiff that he did not hear it. That is no evidence that it was not done. It is consistent with two things—one that it was not given, the other that, though given, it was not heard. And when testimony is equally consistent with two things, it proves neither. This may seem a subtlety, but it is not. We all know what is done at nisi prius on such occasions. The question is, "Had he called out, should you have heard?" If the answer is, "I can't say," then there is no evidence. If "Yes," there is. But "I did

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not hear" is no evidence. The witness did not say "I should have heard the warning," else why not have heard the train; and that, perhaps, is why the question was not asked.

POLLOCK, B., and AMPHLETT, B., concurred with the judgment of Mellor, J., and Bramwell, B.

CLEASBY, B. In this case the question arises upon a bill of exceptions. If it arose upon a point reserved by consent, the Court is entitled by the consent to deal to a certain extent with the facts, and in that case they may consider whether the evidence was sufficient to justify, in their opinion, a verdict for the plaintiff. But upon a bill of exceptions, if there is evidence, without reference to the question whether the finding upon it would be satisfactory, the verdict must stand.

A judge may make a mistake upon a matter of law when he sums the case up to the jury, and in that case a bill of exceptions would properly raise the question. But when the question raised is one of neglect of duty, and to a considerable extent not matter of law, but for the jury, I cannot satisfy myself that the learned judge who tried the case took such an erroneous view of the effect of the evidence as to justify me in coming to the conclusion that there was no evidence whatever which could possibly be left to the jury. I, therefore, come to the same conclusion as the Lord Chief Justice, and am for affirming the judgment.

Venire de novo.

Attorneys for plaintiff: *Harper, Broad, & Battcock.*
Attorneys for defendants: *Young, Maples, & Co.*

[IN THE EXCHEQUER CHAMBER.]

1874
June 24.

ALLISON *v.* THE BRISTOL MARINE INSURANCE COMPANY.

Marine Insurance—Policy on Freight—Prepayment of Freight—Partial Loss.

The plaintiff chartered his ship to A. for a voyage from Greenock to Bombay with a cargo of coals, freight to be paid on right delivery of cargo at the rate of 42*s.* per ton of 20 cwt. on the quantity delivered; and it was provided that such freight should be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment commission at Bombay, and the remainder on right delivery of cargo, &c.

A cargo of 2178 tons of coal was loaded, and bills of lading signed, and 2286*l.* was paid on account of freight. The plaintiff insured the freight under the charterparty, and the charterer effected an insurance on the cargo, which was expressed to be on 2178 tons of coal and increased value thereof by prepayment of freight, valued at 4500*l.*

The ship sailed, and was lost near Bombay; about half the cargo was lost, and the remainder was safely delivered to the consignees of the charterers free of freight. The plaintiff, the shipowner, sued his insurer as for a total loss of the unpaid half freight. The defendants paid into Court the half of such unpaid freight:—

Held (by Cockburn, C.J., Mellor, J., and Amphlett, B.; dissenting, Cleasby and Pollock, BB.), reversing the decision of the Court below, that the amount of freight prepaid must be distributed over the whole of the cargo; and, consequently, the charterer was bound to pay to the plaintiff half the amount of the freight remaining unpaid upon the delivery of the half cargo; that there was only a partial loss of freight, covered by the payment into Court; and the defendants were, therefore, entitled to judgment.

Revd by H of L. 1 App Cas 209.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants.

The facts sufficiently appear from the judgments.

Benjamin, Q.C. (with him *C. Russell, Q.C.*), for the defendants. The right of the plaintiff to recover from the defendants depends on the question whether he could not recover in respect of the freight from the charterer beyond the amount paid into Court; in other words, whether there was a loss of freight beyond that amount. Upon the true construction of the charter the freight must be treated as a freight of so much per ton, not as a lump sum. The shipowner is to have a guinea a ton for the outfit of the ship and the receipt of the cargo, which he is not to return in any event, and a guinea a ton for the delivery of the goods on the other side. To prevent the loss of the advance to the charterer if the goods are lost, it is provided that the shipowner shall supply him with the money for the premium of insurance for the purpose. The result of the plaintiff's contention would be, that he would recover the guinea a ton on the goods that went to the bottom at the shipowner's expense out of a fund provided by him, and also deduct it from the freight of the goods delivered in safety. He would thus get it both ways, and actually gain by the loss of the goods, the entire loss being thrown on the shipowner. The term "freight" includes payment for two different things; first, receipt of the goods on board, and the undertaking to carry; secondly, actual carriage and delivery at the end of the transit. The effect of this charter was to separate those two things, attributing half of the freight to each.

[COCKBURN, C.J. That seems to involve the use of the term "freight" in two senses in the same instrument.]

[He cited *Watson* v. *Shankland* (1); *Kirchner* v. *Venus.* (2)]

Watkin Williams, Q.C. (with him *McLeod*), for the plaintiff. The true construction of the charter is, that the whole quantity of coal is to be carried at a freight calculated at the rate of 42*s.* a ton, but it does not mean that each 42*s.* is to be attributed to each ton. Half of the stipulated freight is to be paid in advance, but the part prepaid still remains to be earned, and is not earned until delivery at the end of the voyage. The meaning of the provision as to the deduction for insurance is not what the defendants allege. As by the English law there is no return of prepaid freight, the shipowner has no insurable interest in the prepaid freight, and he simply deducts a sum in respect of the amount which he would, but for the prepayment, have had to pay for insurance. It is not, as was suggested by the defendants, an arrangement that if the half freight were prepaid, the shipowner would provide the charterer with the means of insuring it. The fact that the mode of insuring adopted, viz. by means of a valued policy on the goods, enabled the charterer to recover, in fact, the prepayment on the goods lost, is immaterial to the decision of this question, which turns in reality

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(1) Law Rep. 2 H. L., Sc. 304.

(2) 12 Moo. P. C. 361.

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ALLISON v. BRISTOL MARINE INSURANCE CO.

wholly on the construction of the charterparty. It happens by chance that by this means the charterer gains an advantage, but this can afford no guide to construing the charter. If the charterer had insured the prepaid freight eo nomine he would not have been able to recover on the policy in respect of the prepaid freight, if the plaintiff's construction of the charterparty be correct, for there would have been no loss. The charterer might have pocketed the premiums and have been his own insurer, if he had thought proper. The argument of the defendants involves that he was bound to insure in the form of a valued policy on the goods, including therein the amount of the prepaid freight. It is the anomalous and exceptional effect of a valued policy that enabled the charterer to put 500*l.* in his pocket as against no loss by him. If there had been nothing about insurance in the charterparty, it must have received the construction for which the plaintiff contends. The ship has only earned freight in respect of the carriage of 1000 tons of coal, but so much as has been earned has already been paid.

[He cited *Flint* v. *Flemyng.* (1)]

Benjamin, Q.C., in reply. The true effect of the bargain was, that the risk was to be shared between the parties, viz. that half the risk, that on the prepaid freight, should be the charterer's risk. It is doing violence to the intention of the parties to hold that all the loss is to fall on the shipowner. The shipowner has provided the charterer with an indemnity as to the prepaid freight.

[He cited *The Norway* (2); *Merchant Shipping Company* v. *Armitage.* (3)]

Cur. adv. vult.

June 24. The following judgments were delivered:—

AMPHLETT, B. The action in this case was brought by the plaintiff, the owner of the ship *Merchant Prince,* on two policies of insurance on the freight of that ship, on a voyage from Greenock to Bombay, to recover for a total loss. The first of the said policies was dated the 13th of April, 1867, whereby the defendant insured 500*l.* on "freight valued at 2000*l.*;" and the second policy was dated on the 23rd of April, 1867, for 700*l.* on "freight payable abroad valued at 2000*l.*" The plaintiff also effected two other policies with other underwriters on the freight payable abroad of the *Merchant Prince*, for the same voyage as above, for the sums of 500*l.* and 300*l.* respectively. The said ship was chartered for the voyage in question to a Mr. De Mattos by a charterparty dated the 7th of March, 1867, which provided that the ship should load a full cargo of coals at Greenock for Bombay, freight to be paid on unloading and right delivery of cargo at and after the rate of 42*s.* per ton "of 20 cwt. on the quantity delivered." And it was further provided that such freight was to be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coal short delivered, in cash, at current rate of exchange for bills in London at six months' sight. On the 15th of April, 1867, bills of lading were signed by the captain of the said ship for 2178 tons of coals, and on or about the same day the plaintiff received from De Mattos 2286*l.* 18*s.*, for which the plaintiff gave the following receipt indorsed on the bill of lading: "Received from W. N. De Mattos, Esq., the sum of 2286*l.* 18*s.* sterling, being advance of half freight on within shipment, the owner having paid all charges, including consignment commission at Bombay, as per charterparty, 2286*l.* 18*s.*" On the 20th of April 1867, De Mattos effected an insurance on the said cargo of the *Merchant Prince* for the said voyage. The insurance was stated in the policy to be "on 2078 tons of coal, and increased value thereof by prepayment of freight, valued at 4500*l.*"

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(1) 1 B. & Ad. 45.

(2) 1 Br. & Lush. 226; 3 Moo. P. C. (N.S.) 245.

(3) Law Rep. 9 Q. B. 99.

(2) S C 11 Jur. N S. 892.

On the 27th of April, 1867, the said ship left Greenock for Bombay, and on the 8th day of August, 1867, she struck on a reef, and there became a total wreck. About 1050 tons (which may be referred to as a moiety of the coals forming the cargo) were saved from the wreck, and ultimately landed at Bombay. At the trial a verdict was by consent entered for the plaintiff for the full amount with leave to move to enter the verdict for the defendants, or to reduce the damages; and a rule nisi having been granted by the Court of Common Pleas, cause was shewn against it in Trinity Term, and the same was discharged and judgment given for the

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plaintiff for the full amount of his claim with interest. The judgment of the Court of Common Pleas proceeded upon the principle that, according to the true construction of the charterparty, the prepaid moiety of the freight was to be taken in payment of the freight upon the saved portion of the cargo, in which case the latter would be satisfied, and there would be a total loss of the other moiety of the freight to the shipowner, and the question we have to determine is whether that judgment is correct. It may be observed, in the first place, that the effect of that judgment is, that the charterer, while setting off the whole of the prepaid moiety of the freight against the freight on the saved moiety of the cargo is, at the same time, entitled to recover a moiety of what he so paid in advance from his own underwriters, and will thus obtain for himself, at the expense of the shipowner or his underwriter, a bonus or profit of 1*l.* a ton in respect of the coal lost over and above the value of such coal.

It is, I think, impossible not to suspect some error in a judgment which has led to a result so strange and inequitable. It was said, indeed, in argument before us, that this startling result arises from the mode in which the charterer effected his insurance, and that the apparent anomaly would not have existed if valued policies had not been allowed by our law, and the charterer had effected an insurance simply on the prepaid moiety of the freight. But I cannot concur in this view, for, supposing he had insured separately the prepaid moiety of the freight in identical terms with the insurance effected by the shipowner in respect of the other moiety of the freight, the underwriters of the last-mentioned moiety would, according to the principle of the judgment, have borne the whole loss, and the other underwriters nothing—a result which appears to me equally strange and inequitable as the former.

I venture, however, with great deference, to think that the assumption upon which the judgment proceeds is erroneous, and that the prepayment of a moiety of the freight ought not in this case to be taken as a payment on account of the freight actually earned by delivery of the cargo, but on account of what might contingently be earned in respect of the whole cargo.

No doubt it might have been stipulated, as it frequently and, perhaps, generally is in practice, that the prepayment of freight should be taken as a payment on account of freight actually earned; but in the charterparty in question there is no express provision to that effect, and I am of opinion that there are sufficient indications to be found in it that it was not so intended by the parties.

Freight is by the charterparty to be paid after the rate of 42*s*. per ton on the quantity delivered, and such freight is to be paid, one-half in cash on signing bills of lading, with certain deductions, and the remainder on the delivery of the cargo. Now, all this proceeds upon the assumption that the whole freight will be earned, and does not contemplate or provide for the case of a loss either total or partial. It is clear that the half to be prepaid must be calculated on the whole cargo without reference to possible loss, and as it is admitted on all hands that, according to the English law, however much it may be disapproved of by high authority, no part of such prepayment could be recovered in any event, it appears to me that the most reasonable construction of the charterparty is to hold that for all purposes the prepayment should be taken as made in respect of the whole cargo, and consequently in the event which has happened distributable between the part lost and the part saved.

This view of the case appears to be strengthened by the deduction allowed for insurance, which denotes, according to Lord Selborne in *Shankland* v. *Watson* (1) (which, in other respects, has not, I think, any material bearing on the present case), that it was in the contemplation of both parties that each should bear the risk of, or insure for, one moiety of the freight. This construction, too, has at least the merit of doing complete justice between the parties in every event. In the actual case before us the result will be that the charterer will have to pay to the shipowner, to the relief of the latter's underwriters, one moiety of the freight upon the cargo saved, and be recouped for the same out of the moneys received on his own policy, which virtually covers freight as well as cargo. If, on the other hand, the shipowner and charterer had each insured for the value of a moiety of the freight, the loss would have fallen, as in justice it ought, equally between the respective underwriters. Or, lastly, if neither of them had insured,

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(1) Law Rep. 2 H. L., Sc. 304.

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or, in other words, if each had been his own insurer, each would have borne a moiety of the loss, which again would be quite just, inasmuch as the premium of insurance in respect to the charterer's moiety was allowed him out of the prepayment of freight. For these reasons, I am of opinion that the plaintiff was not entitled to recover from the defendants as for a total loss; and it being admitted that in that case the defendants have paid into Court all that is due from them, I think that the judgment of the Court below ought to be reversed, and the rule to enter a verdict for the defendants made absolute.

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MELLOR, J. The plaintiff was the owner of the ship *Merchant Prince*, and the defendants are an insurance company. The action is brought to recover against the defendants as for a total loss on several policies of insurance effected by the plaintiff with the defendants on freight valued at 2000*l.*, and if, under the circumstances of the case, the plaintiff is entitled to recover as for a total loss, the judgment of the Court below must be affirmed; but if the loss is to be considered as a partial loss only, the defendants have paid into Court sufficient to cover such partial loss, and the judgment of the Court below must be reversed. The facts are singularly few, and the question turns entirely on the true construction of a charterparty, dated the 7th of March, 1867, made between the plaintiff and one W. N. De Mattos, which provided that the ship should load a full cargo of coals at Greenock for Bombay, "freight to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwt. on the quantity delivered." And it was further provided as follows:—"And such freight is to be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum; 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay; and the remainder on right delivery of the cargo, less cost of coal short delivered, in cash, at current rate of exchange for bills on London at six months sight." On the 10th of April, 1867, bills of lading were signed by the captain of the said ship for 2178 tons of coal, and on or about the same day the plaintiff received from the charterer 2286*l.* 18*s.*, for which he gave the following receipt and memorandum on the bill of lading:—"Received of W. N. De Mattos, Esq., the sum of 2286*l.* 18*s.* sterling, being advance of half freight on within shipment, the owner having paid all charges, including consignment commission at Bombay, as per charterparty." On the 20th of April, 1867, the charterer effected an insurance on the cargo of the *Merchant Prince* for the voyage. The insurance was stated in the policy to be "on 2178 tons of coal, and increased value thereof by prepayment of freight valued at 4500*l.*" On the 27th of April, 1867, the ship left Greenock for Bombay and, on the 8th of August, 1867, struck on a reef about eight miles from Bombay and there became a total wreck. About 1050 tons of the cargo were saved and landed at Bombay, and there sold for account of whom it might concern. No further sum was received by the plaintiff, or paid to him on account of the said freight, beyond the sum of 2286*l.* 18*s.* paid in advance.

It was admitted, in the argument before us, that the question turned upon the proper construction of the charterparty and the payment of one-half freight in advance on the signing of the bills of lading. It was contended for the plaintiff that the freight being made payable on unloading and right delivery of cargo, at and after the rate of 42*s.* per ton, was a mere mode of estimating the total freight, and that the meaning of the words, such freight is to be paid, "say one-half in cash on signing bills of lading, less four months' interest, &c." was, that the payment should enure as a payment of half the total freight, and assuming the total freight to which he would have been entitled on unloading and right delivery at Bombay to be 4000*l.*, in round numbers, he had only received 2000*l.*, and was entitled to claim from the defendants for the residue as representing his loss by the perils insured against. I cannot accede to that view of the case, and I do not think such is the true effect of the charterparty. The agreement that the freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwt. on the quantity delivered, is followed by a stipulation that "such freight was to be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum; 5 per cent. for insurance, and 2½ on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, &c." Not only, therefore, was one-half of such freight to be paid in cash on signing bills of lading, but there was a deduction of 5 per cent. for insurance in respect of the amount paid in advance. And the charterer did accordingly, on the 20th of April, 1867, effect an insurance "on 2178 tons of coal and increased value thereof by prepayment of freight valued at 4500*l.*" It was agreed on all hands that no part of the freight so paid in advance could ever thereafter be recovered back from the plaintiff by the charterer, and consequently the sea risk of so much of the freight as was paid in advance was transferred from the plaintiff to the charterer. It seems to me that the effect of the contention on the part of the plaintiff must be that the payment in advance was really a payment of the freight upon one-half of the cargo, leaving the freight on the other half of the cargo to be paid on right delivery. The agreed freight was to be at and after the rate of 42*s.* per ton on the quantity delivered, but there is nothing by which half the cargo can be separated from the remainder, and earmarked as the portion in respect of which the freight was paid in advance. The whole cargo was insured by the charterer as made more valuable by the prepayment of half freight in advance, and it appears to me, under the words "at and after the rate of 42*s.* per ton on the quantity delivered," both the freight and payment must be distributed over the entire cargo, and that the payment in advance was an equivalent to the payment of 1*l.* 1*s.* on every ton of the cargo, so as to reduce the amount of freight payable by the charterer on delivery to the like sum per ton. I cannot agree that the true mode of estimating the loss sustained by the plaintiff is to lump the freight at, say 4000*l.* for the voyage, and seeing that, inasmuch as he received payment in advance of 2000*l.* only, that therefore his loss is the difference between that sum and 4000*l.* I think that he lost by the perils of the sea 1*l.* 1*s.* upon all the coals that were lost and became incapable of delivery by reason of such perils, and that under the circumstances it constituted a partial loss only, and that he was only entitled to be indemnified by the defendants to that extent; and as the amount paid into Court covers that loss, the defendants are entitled to succeed, and that the judgment of the Court below ought to be reversed.

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COCKBURN, C.J. I concur in the conclusion of my Brothers Mellor and Amphlett in this case. The facts are simple. The plaintiff claims for a total loss on a policy of insurance on freight to be earned on a voyage of the ship the *Merchant Prince* from Greenock to Bombay. If, according to the terms of the charterparty, the plaintiff as between himself and the charterer of the ship was, under the circumstances, entitled to claim a portion of the freight, he cannot recover on a claim for a total loss. The question turns therefore on his right under the charterparty, in other words, on the true construction of the charterparty. Now by the terms of the charterparty the freight which was to be earned on the carriage of a cargo of coals was to be paid "on the unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwt. on the quantity delivered," and "such freight was to be paid one-half in cash on signing bills of lading, less four months' interest at bank rate, but not less than 5 per cent.; 5 per cent. for insurance, and 2½ on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo less cost of coal short delivered, in cash at current rate of exchange for bills on London at six months' sight."

Bills of lading were signed by the captain for a certain amount of coal, and a sum was thereupon paid by the charterer to the owner, calculated to amount to one-half of the freight, so as to satisfy the stipulation of the charterparty.

A portion of the cargo was lost on the voyage by the perils insured against. The remaining portion was delivered up by the captain on the completion of the voyage to the consignees of the charterer without any further demand of freight, on the assumption that the freight was only demandable in respect of the portion actually delivered, and that such freight was satisfied by the amount paid in advance on account of freight. But the insurers are not bound by the acquiescence of the shipowner in this view of his right, and if the shipowner was entitled in point of law on the true construction of the charterparty to claim additional freight, the insurer is justified in insisting that there has not been a total loss of freight, and if this contention is right the loss can only be a partial loss, in which case, there having been a payment into Court as on a partial loss, the defendants will be entitled to our judgment.

The question depends on whether the remainder of the freight being payable on the right delivery of the cargo the portion of the freight paid in advance can be appropriated to the amount of cargo actually delivered, or whether the amount so prepaid must be considered as paid in respect of the entire cargo and distributed over the whole cargo, including the part of it which was lost as well as the part delivered. It appears to me that this question must be considered irrespectively of the insurances which the shipowner or the charterer may have effected for the protection of their actual or supposed interests, in other words, according to the terms of the charterparty and the rights and liabilities of the parties as thereby created. Now I cannot but suppose that on a charterparty of this description a payment of freight in advance, which by the English law in case of the loss of the cargo cannot be recovered back, presupposes in the contemplation of the parties a delivery of the entire cargo, and is paid in respect of the entire cargo, and is therefore distributable over the entire cargo, for which reason it is not, as it appears to me, competent to the owner of the cargo to appropriate the whole of the amount prepaid to that portion of the cargo which is actually delivered, and he can only have the benefit of such prepayment pro ratâ on the cargo delivered. On this short ground I am of opinion that one-half of the freight remains payable on the cargo delivered, and that consequently there has been no total loss, so that the claim of the plaintiff as for a total loss fails.

CLEASBY, B. In this case the plaintiff, a shipowner, claimed a total loss upon valued policies on freight, the voyage being from Greenock to Bombay. The defendants paid into Court half the amount.

The plaintiff alleged that he had insured the freight which he was to receive at the termination of the voyage, and that as in consequence of the perils insured against he was entitled to receive none, there was a total loss. The defendants contended, that in the events which had happened the plaintiff was entitled to receive at the termination of the voyage half the freight insured, and so there was a partial loss only. Thus the subject of dispute between the parties, viz. the right to freight at the termination of the voyage under the circumstances, depended upon the proper construction of the charterparty, which was admitted to be the only question raised, in the case, and was the only one argued before us. The charterparty between the plaintiff and one De Mattos, under which the freight was to be earned, was dated the 7th of March, 1867, and provided that the ship should load a full cargo of coals at Greenock for Bombay, freight to be paid on unloading and right delivery of cargo at and after the rate of 42*s.* per ton of 20 cwt. on the quantity delivered. And it was further provided as follows: "and such freight is to be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but not less than 5 per cent. per annum; 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coal short delivered, in cash at current rates of exchange, for bills on London at six months' sight." The cargo was put on board, and half the estimated amount of freight paid, 2286*l.* 18*s.*, the receipt being as follows: "Received from W. N. De Mattos, Esq., the sum of 2286*l.* 18*s.*, being advance of half freight on within shipment, the owner having paid all charges, including consignment commission at Bombay as per charterparty." The plaintiff effected two policies on freight, and De Mattos effected a policy on the cargo, adding to the value the half freight paid by him. The vessel having sailed on the voyage, and half the cargo having been lost by the perils of the sea, arrived at Bombay with half the cargo; and it appearing that the freight, at 42*s.* per ton, of what arrived was not more than the sum of 2286*l* 18*s.* already received by the owner for freight, the captain delivered the cargo free of freight, and the plaintiff brought his action, having, as he contended, totally lost by the perils the freight which he expected to receive at Bombay, and which he had insured. So the question is, was the captain bound to deliver the cargo which arrived free of freight beyond that already paid, or could he have insisted upon payment of one-half freight upon the quantity delivered? There is nothing unusual in the terms of this charterparty. It is quite common for

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the shipowners to be put in funds by a prepayment of freight, although properly speaking freight is what is earned by the carriage of goods to their destination, and when that is done the deductions made in the present case are intended to put the shipowner in the same position as if the freight had been paid at the end of the voyage, the first deduction being interest for the estimated duration of the voyage, four months, which the owner gained by the prepayment; the second, the amount of insurance which he saved by having the payment actually made and no longer subject to risk; requiring no insurance, and the third, the consignment commission which he would have to pay to the broker to whom the ship was consigned at the other end for collecting the freight.

All this is only a mode of calculating the amount to be paid for one-half the freight, and clearly imposes no obligation upon the charterer. According to the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and incapable of delivery. This must be considered as settled, having been decided as long ago as 1683 and not departed from since, though Lord Chief Justice Cockburn has expressed a wish that the law was otherwise, and in conformity with the law of most other countries: see *Byrne* v. *Schiller*. (1) And the consequence is, that the amount so prepaid for freight is no longer at the risk of the shipowner, but at the risk of the charterer, and he has an insurable interest which he may, if he thinks proper, insure as a part of his insurance on the cargo, or otherwise. But whether he does or not can make no difference as to the freight which becomes payable upon the shipowner's being ready to deliver at the port of destination. If there had been a charter in the present case without any clause for prepayment of one-half, and the goods had been put on board and half lost, what would have been the freight payable? Undoubtedly freight at the stipulated rate upon the half cargo carried to its destination. The meaning of the word "freight" must be the same, in my opinion, whether there be a prepayment or not, and thus in the present case all the freight which became payable was the one-half which had already been satisfied, and so the other half which was insured was totally lost; and this is the meaning of the word "freight" expressed in the charterparty: "Freight to be paid upon unloading, and right delivery of the cargo at and after the rate of 42*s.* per ton upon the quantity delivered." Some confusion is introduced into the case by the circumstance that the payment to be made is of one-half of the freight, and this gives rise to the idea that there is afterwards a joint risk in the whole freight, whereas it is in reality a case of debtor and creditor, and not of joint risk, and a payment of a sum on account of freight to be earned fixed by agreement of the parties at half the estimated freight. But to get rid of this source of error suppose that the payment was of 1000*l.* on account of freight. The owner would make certain deductions on account of the earlier and sure payment, and receiving the balance, which might be 950*l.*, would give a receipt for 1000*l.* on account of freight (as he has in the present case for 2286*l.* 18*s.*). Upon the arrival of the ship it might appear that the freight earned came to 1500*l.*, and if so the charterer gets the full benefit of the 1000*l.* paid, and pays the balance of 500*l.* If he has insured his prepaid freight for 1000*l.* he can be entitled to receive nothing, because he has lost nothing by perils, but had the full benefit of his prepayment. If the freight due on the arrival of the ship had been 750*l.* from cargo being lost to a larger amount, he would have the benefit of his payment to the extent of 750*l.*, and would be entitled to receive the 250*l.* lost from the underwriters, as a partial loss. The case here is the same; there is a receipt for 2286*l.* 18*s.*, the amount of half the estimated freight. It is still a payment on account of freight, and De Mattos was entitled to and had the full benefit of it. I will only add upon this part of the case that the error (if I may be allowed the expression) is in concluding that, because the ship-owner and charterer are each interested in half of the freight, therefore their interest in the whole is the same. But that is not the case, because, independent of the equality of amount there is a priority of payment. The prepayment should satisfy that which was first earned to the amount of the prepayment. It is like the case of a mortgage for 2000*l.*, to which two persons are entitled in halves, but one is to be paid off in preference to the other, so that if the security is insufficient that part only could be paid. Each is interested to the same amount, viz., one-half, but they have not the same interest in the whole. The learned counsel for the defendants relied very much in the course of his argument upon the deduction of the 5 per cent. for insurance of the half freight, which he repeatedly described as money paid to the charterer to be applied for that purpose, so as to give the shipowner an interest in its being so applied, and make the insurance accrue to his benefit. But this appears to me to be a mistaken view of the deduction, which is in reality only a mode of arriving at an equivalent for what the shipowner would receive at the end of the voyage, and placing the charterer in the same position as the shipowner would have been in as regards insurance, and with the same option to insure or not.

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(1) Law Rep. 6 Ex. 325.

The learned counsel also relied very much on the obvious gain to the charterer if he insured his cargo at a value increased by the prepayment in the event which happened, viz., of one half being lost by the perils. It was said that he would be repaid one half of his advance by the underwriters on the goods, and then get the one half of his goods delivered free of freight, and so have the benefit of the whole advance, the result being a gain of one-half the amount advanced. This was explained by the learned counsel for the plaintiff, but not so fully as it might have been, probably because he thought the matter too clear to need further explanation. It is accounted for in this way. If the charterer had insured his real interest at risk, viz., the prepaid freight, 2268*l.*, then, if at the end of the voyage the freight payable had amounted only to that sum, he would have had the full benefit of the payment made in discharge of the freight, and would, of course, have recovered nothing under his policy, and no profit would have been made. But by means of a valued policy on the goods, in which the value of the goods is increased by the amount of the prepaid freight, this falsehood (as it may be called) is introduced, viz., that all the goods are supposed to be so increased in value, whereas in reality those only are increased in value which arrive at their destination, and thus if any were lost the charterer recovers, not upon the real value, but upon that value increased by the proportion of freight, and he so makes a profit by insuring the goods beyond their value. He may do this in any case, by insuring beyond the value, if the underwriters agree to it, and they cannot object to it, because they get paid the premium in proportion. This is the explanation of the profit made by De Mattos, viz., that the goods lost were insured beyond their value, and so a profit was obtained, instead of a mere indemnity.

1 App Cas 251.

I do not think we can depart from the settled meaning of the word "freight," and the meaning expressly given to it in this charter-party, viz., the amount to be paid at the end of the voyage for what is ready for delivery at the stipulated rate. This had been wholly satisfied by the advance made, and so the shipowner was entitled to receive no more, and the captain was right in delivering the half cargo free of freight.

The result is, that the freight which was insured was wholly lost by the perils, and the judgment of the Court below, which is founded upon this conclusion, must, in my opinion, be affirmed. I beg to add one other remark upon the construction of this contract. Charterparties containing provision for prepayment, or advances to the master with the same effect as prepayment, have been usual as long as I remember, and it is not too much to say that thousands of such charters have been effected, upon which the captains of vessels have acted in all parts of the world with the responsibility of delivering or refusing to deliver the cargoes, and in order to discharge their duty they must have made themselves acquainted with the effect of prepayment, and their duty ought to be a plain one, and not depend upon nice distinctions; and it is a plain one, if they have to consider only what is the freight earned and what amount has been prepaid. In the present case there appears to have been no question between the shipowner and the charterer as to the proper mode of performing the contract. The captain delivered the goods free of freight, because a sum of money equal to the freight earned had been paid. But a third party, the present defendants, now say that the captain was so ignorant of his rights as to have delivered the goods free of freight, when he had a claim of 1000*l.* It would be strange, but he may have acted in ignorance of the proper effect of the agreement. I could not properly construe an agreement, especially in a court of error, by what the parties understood to be the effect of it; but I must say my own clear view of the legal effect of an agreement in common

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use is confirmed by finding that the parties to it, who may be taken to be well acquainted with such agreements, acted in conformity with that view.

My Brother Pollock concurs in this judgment.

Judgment reversed.

Attorney for plaintiff: *Nash.*

Attorneys for defendants: *Argles & Rawlins.*

LORD BOLINGBROKE *v.* THE LOCAL BOARD OF SWINDON NEW TOWN.

June 25.

4 App
Cas 277

Master and Servant—Authority—Scope of Employment.

A local board of health, being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to one B. A ditch ran between the farm and the land of the plaintiff. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon the plaintiff's land and pared away his side of the ditch, and cut down so much of the brushwood and underwood on the plaintiff's side, as impeded the flow of drainage along the ditch:—

Held, that the acts so done by B. were not within the scope of his employment; and consequently the local board were not liable for them at the suit of the plaintiff, there being no implied authority from the board to do them.

Trespass to land. Plea, not guilty. Issue thereon.

At the trial before Quain, J., at the Wilts Assizes, the facts were as follows:—The defendants were the proprietors of a sewage farm, which they used for the disposal of their sewage, and had intrusted the management of it to one Buchan. It was shewn that they had given Buchan the most ample powers to manage the farm in the most beneficial way with a view to the purposes for which they used it. It was necessary for those purposes that the drainage from the farm should be effective. A ditch divided the farm from the plaintiff's lands. With a view to render the ditch more efficient for drainage purposes, Buchan wrongfully went on to the plaintiff's land and pared away the plaintiff's side of the ditch, and cut down brushwood, and underwood, and trees which impeded the flow through the ditch. The defendants never interfered with Buchan's management of the farm, but left all to him,

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only paying the necessary expenses. Upon those facts the learned judge directed a verdict for the defendants, with leave to the plaintiff to move to enter it for himself, for damages to be assessed by an arbitrator, on the ground that Buchan had authority to do what he did from the defendants.

A rule nisi had been obtained accordingly.

Lopes, Q.C., and *Mackey* shewed cause. They contended that there was no implied authority on the part of Buchan to commit a trespass on the land of the plaintiff, such an act not being within the scope of his authority, which was confined to dealing with the farm. They cited *Limpus* v. *General Omnibus Co.* (1); *Seymour* v. *Greenwood* (2); *Lyons* v. *Martin* (3); *Poulton* v. *South Western Ry. Co.* (4)

Cole, Q.C., and *Pinder* supported the rule. They contended that the case came within the principle that where a person puts another in his place to represent him with regard to the management of a business, he is liable for all acts, however wrongful, which the person so acting for him may do, acting bonâ fide with the intention of carrying out the business entrusted to him. They cited *Barwick* v. *English Joint Stock Bank* (5); *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (6); *Mackay* v. *Commercial Bank of New Brunswick.* (7)

KEATING, J. We have had the advantage of very able arguments on both sides, and the authorities have been very fully brought before us. I come without difficulty to the conclusion that the rule ought to be discharged. There is no question but that a trespass was committed on the plaintiff's land, and the only question is as to the defendants' liability for it. The local board had taken a sewage farm and had entrusted the management of it with most extensive powers to Buchan. The board do not seem to have interfered with him at all, he employed the labourers, and the only part the board seems to have taken was to give Buchan cheques

(1) 1 H. & C. 526; 32 L. J. (Ex.) 34.

(2) 6 H. & N. 359; 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.

(3) 8 Ad. & E. 512.

(4) Law Rep. 2 Q. B. 534.

(5) Law Rep. 2 Ex. 259.

(6) Law Rep. 7 C. P. 415; 8 C. P. 148.

(7) Law Rep. 5 P. C. 394.

for the purposes of the necessary payments. It was necessary, as Buchan thought, and probably rightly thought, to increase the fall of a drain or watercourse dividing the land of the board and that of the plaintiff. To do that completely he thought it necessary to deepen the bed of the drain, and to straighten it by means of cutting away both sides, and cutting such portion of the brushwood, underwood, and trees on the plaintiff's land, as well as on the board's land, as impeded the course of the stream. Mr. Justice Quain thought at the trial that there was no evidence to fix the defendants with liability for the acts of Buchan, and directed a verdict for the defendants, reserving leave to move. I think that he was right in so doing. It has been well argued by Mr. Pinder that the liability of principals for the acts or representations of agents has been carried in the case of commercial matters to a very considerable length, and he cited various cases, e.g. *Barwick* v. *English Joint Stock Bank* (1), tending to shew that undoubtedly where, in commercial and other matters, a principal gives such large and extensive powers to an agent as to put him, as it were, in place of himself, he is liable even for the wrongful acts committed by the agent in the course of the employment or the carrying out of the business with which he is intrusted. Bank managers and other agents have no doubt been guilty of false representations, and the principals have been held liable.

All these cases shew that the liability of the principal extends to all acts done by the agent in furtherance and within the scope of the business with which he was intrusted. The case of *Poulton* v. *South Western Ry. Co.* (2) seems to me to illustrate the distinction between the class of cases of which it is an example and the class of cases to which Mr. Pinder drew our attention, of which *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) may be taken as an example. In the latter case a railway porter, having been intrusted with a general authority for certain purposes in connection with the management of the carriages of his employers in the station where he was employed, the company was held liable for his wrongful act in removing a passenger from a carriage which he erroneously thought was the wrong carriage.

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(1) Law Rep. 2 Ex. 259.

(2) Law Rep. 2 Q. B. 534.

(3) Law Rep. 7 C. P. 415; 8 C. P. 148.

In *Poulton* v. *South Western Ry. Co.* (1) the servant was authorized to arrest persons in certain cases, but the company itself had no power in other cases to arrest, and the servant arrested the plaintiff in a case in which the company had no power to arrest, and it was held that there could be no implication of authority from the company to the servant to arrest in cases where the company had no power to arrest itself. In applying the principles to be deduced from these authorities to the facts of the present case, it seems to me that the authority which was given to Buchan was confined to the defendants' farm and its management, and could not be extended so as to authorize him to commit a trespass on the land of a neighbour, even though he might think the act he did was for the benefit of the neighbour. The powers given to him with respect to the management of the defendants' farm were no doubt very wide, but I do not see how they could authorize a wrongful act on another person's land or render his employers liable for his wilful act of trespass. It was urged by Mr. Pinder that the defendants had derived benefit from the acts of Buchan. In some cases the consideration that the employer has elected to take the benefit of the wrongful act is important; but the argument loses its weight where, as in the present case, the defendants are obliged to take things as they stand, and have no option in the matter. On the whole, admitting that the cases run rather closely on this subject, I am of opinion that this case is clearly on the side of the line on which my Brother Quain placed it, and this rule should be discharged.

GROVE, J. I am of the same opinion. It is difficult, no doubt, to lay down an exact absolute line of demarcation between acts done within the scope of an authority and those beyond it. In one sense all wrongful or negligent acts are beyond the scope of the authority, but, to use an expression taken from another subject matter, there are certain lines of deviation, and there are some things which may be so naturally expected to occur from the wrongful or negligent conduct of persons engaged in carrying out an authority given, that they may be fairly said to be within the scope of the employment. Though, in some cases, the distinction between acts done in the scope of an employment and wilful acts beyond the authority given runs very fine, in the present case I think there is not much difficulty. If Buchan, in ameliorating the condition of the farm, for which purpose he had the most ample authority, by anything he had done on the farm itself, caused injury to the plaintiff's land, he might possibly have rendered his employers liable, but here the act was done on the land of the plaintiff. There is no ground for supposing that Buchan thought what he was doing was within the scope of his authority, or that he did not know that he was committing a trespass; nor could it be said, irrespective of his knowledge, that the act was one which, in any reasonable sense, was within the authority given to him for ameliorating the farm. The authority so given him was to benefit the farm by dealing with it, and by acts done upon it, not upon other land. None of the cases cited by the plaintiff's counsel went the length necessary for his contention, viz. to shew that an agent intrusted with authority to be exercised over a particular piece of land has authority to commit a trespass on other land. It seems to me that this case is distinguishable from all those cases. It has been held, no doubt, that the principal may be liable for the fraudulent acts of an agent. The case of *Mackay* v. *Commercial Bank of New Brunswick* (1) seems to go further in that direction than any previous case. It appears to rest on the ground that plenary power had been given not, as here, for the carrying out a purpose limited to a particular piece of ground, but to conduct the entire business of the principal. For these reasons I agree that the rule should be discharged.

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(1) Law Rep. 2 Q. B. 534.

Attorneys for plaintiff: *Clarke, Woodcock, & Rylands, for Kinnear & Tombs.*

Attorneys for defendants: *Moon, for Townsend & Ormond.*

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(1) Law Rep. 5 P. C. 394.

1874
June 8.

SUMMERS *v.* THE CITY BANK.

Married Woman's Property Act, 1870 (33 & 34 *Vict. c.* 93), *ss.* 1, 11—*Right of Married Woman to sue for the Protection of her Earnings, &c.*

10 QB 148
19 Eq 298
5 Ch D 936
6 Ch D, 742.

The Married Woman's Property Act, 1870, enables a married woman to maintain an action in her own name to recover damages against her bankers for dishonoring cheques drawn by her in the course of a trade which she carries on separately from her husband, or for not duly presenting or not giving due notice of dishonor of a bill of exchange acquired by her in such trade, and intrusted to them by her for presentment,—it being a remedy "for the protection and security" of her separate property, within s. 11.

Whether she can in all cases maintain an action in her own name for a breach of contract, or for a tort, in reference to her separate trade,—*quære*?

The first count of the declaration stated that, in consideration that the plaintiff, who theretofore exercised and carried on, and still exercised and carried on, the business of a restaurant keeper at Crown Court, Old Broad Street, in the city of London, would become a customer of and keep an account with the City Bank for reward and commission to the said bank, the said bank contracted and agreed with the plaintiff that they would, in the course of their dealings with her as her bankers as aforesaid, collect the moneys due on any bills of exchange which she might deposit with them, when and as they respectively became due and payable, and place the moneys so collected to her account at their said bank: that, in pursuance of such contract and agreement, the plaintiff paid into the said bank for collection, and the defendants received from the plaintiff for the purpose aforesaid, a certain bill of exchange payable by Otto Rock at 3, Crown Court aforesaid, for 75*l.*, of which bill the plaintiff was the holder: that all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to have the said bill of exchange presented for payment and the amount placed to her account by the defendants in accordance with their promise aforesaid: yet that the defendants did not present the said bill of exchange to Otto Rock, at &c., for payment when it became due, according to the said contract and agreement, and according to the custom and usage of merchants and bankers, and did not place the proceeds of the said bill of exchange to the plaintiff's account; whereby the plaintiff had been deprived of her remedies on the bill, and of the benefit of the amount thereof, and had had cheques drawn by her on the defendants dishonored, and had been greatly injured in her credit, and exposed to injurious suspicions as to her solvency and honesty, and otherwise damnified.

Second count, that the plaintiff employed the defendants as her bankers, for reward to the defendants as in the first count mentioned, and in consideration thereof the defendants promised the plaintiff to collect all bills of exchange deposited with them by the plaintiff for that purpose, and to give immediate notice to the plaintiff of the dishonor of any of the bills so deposited by the plaintiff with the defendants for collection: that the plaintiff deposited with the defendants a certain bill of exchange for collection as aforesaid, for 75*l.*, accepted by Otto Rock, and the defendants duly presented the bill, which was dishonored: and that all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to a fulfilment by the defendants of their said promise, and to immediate notice from the defendants of the said dishonor: yet that the defendants did not give to the plaintiff notice of the said dishonor according to their said promise, and according to the custom and usage of merchants and bankers; by reason whereof the plaintiff drew cheques upon the defendants to be by them cashed out of the proceeds of the said bill, which cheques were dishonored by the defendants, whereby the plaintiff was injured in her credit, &c.

Third count, that the plaintiff being a sole trader according to the custom of the city of London, and the defendants being bankers as in the first count mentioned, the plaintiff retained and employed the defendants as her bankers, and the defendants accepted the retainer and employment, and upon the terms, amongst other things, that the defendants would from time to time out of moneys in their hands applicable for that purpose, pay on presentment any cheques which might be drawn by the plaintiff upon the defendants and duly presented at their banking house for payment by any person lawfully entitled to receive the amount of such cheque, not exceeding the amount of the moneys in the hands of the defendants applicable to the payment thereof at the time of the presentment thereof; that the plaintiff drew certain cheques upon the defendants, which were duly presented; and that all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to have the said cheques paid by the defendants when so presented: yet the defendants did not pay the said cheques when so presented as aforesaid, whereby the plaintiff was injured in her credit, and certain persons (naming them) refused to deal with her in the usual way of business, &c.

Eighth plea, that, before and at the time of the making of the several agreements, and of the accruing of the several causes of action in the first, second, and third counts mentioned, the plaintiff was and now is the lawful wife of James Summers, who is still living.

Replication, that the causes of action in the said counts in the declaration mentioned arose exclusively from earnings, money, chattels, and property of the plaintiff as and being a married woman, acquired and gained by the plaintiff as such married woman after the passing of the Married Woman's Property Act, 1870, in a certain occupation and trade, to wit, that of a restaurant keeper, in which the plaintiff was engaged and which she carried on separately and apart from her said husband, and that the defendants well knew when they accepted her banking account that she was such married woman so carrying on her business as aforesaid.

Demurrer, on the ground that the Married Woman's Property Act, 1870, does not enable a married woman to maintain an action in her own name for the recovery of damages, as in the first, second, and third counts claimed. Joinder.

May 4. *Sir Henry James, Q.C.*, (*Murphy, Q.C.*, with him), in support of the demurrer. As a general rule, a feme covert cannot sue without joining her husband: *Caudell* v. *Shaw*. (1) The only exception was, that by the custom of London, a feme sole trader might sue in her own name in the city Courts. The question is whether the cause of action here comes within the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93). The Act is intituled "An Act to amend the law relating to *the property* of married women." Sect. 1 enacts that "the wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any moneys or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property." And by s. 11 the married woman may maintain an action in her own name for the recovery of any such wages, earnings, money, and property, and is to have the same remedies for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof, as if she were unmarried. The question is whether this declaration discloses a cause of action within that section. This is not an action brought to recover or protect any earnings, money, or property; nor for a wrong done to any property of the plaintiff: but for an injury to her personal credit or her character as a restaurant keeper. Could she sue for a libel, for instance?

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(1) 4 T. R. 361.

[BRETT, J. If a libel on her in her trade, why not? Would not that be an action to protect her property?]

It would be an action to recover damages for a tort. As well might it be said that she may sue in her own name for a compensation for personal damage or for an injury to her health.

[LORD COLERIDGE, C.J. You must deal with s. 11 as expanded by s. 1.]

What effect is to be given to the word "protect"?

[BRETT, J. Is not the married woman suing for the protection of her trade or business, when the married woman sues for a libel which affects her credit and character as a trader?]

When the legislature meant to give a married woman a right to bring an action for a tort, it used apt language to express that intention: as in s. 26 of 20 & 21 Vict. c. 85, which enacts that, "in every case of a judicial separation, the wife shall, whilst so separated, be considered as a feme sole, for the purpose of contract, *wrong, and injury*, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant." A married woman cannot be a bankrupt: *Ex parte Holland, re Heneage.* (1)

[BRETT, J. Lord Justice Mellish in that case (2) seems to think that she might be if she had separate property. But the Court there were dealing with s. 12 of 33 & 34 Vict. c. 93.]

The real question is whether this is an action substantially brought for the protection of the investment or the business of the plaintiff. Could a married woman sue alone for a slander as to her capacity as a physician?

[BRETT, J. The husband could have an action for a slander of him in his business or profession,—why not the wife also, if a sole trader?]

The only action which the statute gives her is an action for the protection of some *property* which she has acquired by the exercise of her own talents or industry.

[LORD COLERIDGE, C.J. Would the goodwill of her business be *property* of the wife?]

In one sense it would; but it would not be the subject of probate or succession duty; nor would it be liable to be rated.

Day, *Q.C.* (*Currie* with him), contrà. This is substantially an action for the protection of the property of the married woman, whether considered in the light of credit or not. The goodwill of a business is the subject of sale, and its value depends very much upon the credit which the trader enjoys. If a married woman invests her earnings in the purchase of a business, including goodwill, surely an action will lie for the protection of her interest and the enforcement of her rights therein. Anything which affects her credit as a trader inflicts a pecuniary injury or damage upon her property, inasmuch as it diminishes its commercial value. The bill of exchange in question was a chattel acquired by the plaintiff in the course of her trade. Why should she not have an action to enforce the protection of that chattel? It will not be disputed that she might sue for money lent by her. The enactments in ss. 1 and 11 would be utterly useless if the married woman could not maintain such an action as this.

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(1) Law Rep. 9 Ch. Ap. 307.

(2) Law Rep. 9 Ch. Ap. at p. 311.

Sir Henry James, Q.C., in reply. Substantial damages may be recovered against a banker for dishonoring the cheque of a customer, there being sufficient assets in his hands at the time to meet it: *Rolin* v. *Steward.* (1) There is no averment in either count of this declaration that the trade carried on by the plaintiff was founded on her earnings or money; nor does the replication cure the omission by alleging that the cause of action arose exclusively from earnings, money, chattels, and property of the plaintiff as and being a married woman, acquired and gained by her as such after the passing of the Act.

[LORD COLERIDGE, C.J. That might be aided by an amendment, if necessary.]

The defendants have a right to take the opinion of a Court of error upon the declaration as it stands.

Cur. adv. vult.

July 8. The judgment of the Court (Lord Coleridge, C.J., and Brett and Denman, JJ.,) was delivered by

LORD COLERIDGE, C.J. This was a demurrer raising an important question for determination on s. 11 of 33 & 34 Vict. c. 93, the Married Woman's Property Act. The section, so far as it is material to copy its words, is as follows:—"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels, or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, and property, belonged to her as an unmarried woman."

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(1) 14 C. B. 595.

The question raised in the case is, whether a married woman can under the words of this section maintain an action for breach of contract against her bankers.

The declaration against the defendants contained three counts:—1. for not presenting for payment a bill of exchange deposited with them for that purpose,—2. for not giving notice to the plaintiff of the dishonor of a bill of exchange intrusted to them,—and 3. for dishonoring a cheque drawn by the plaintiff upon the defendants, the defendants having at the time funds of the plaintiff to meet it.

The defendants pleaded that the plaintiff was a married woman. The plaintiff replied that the causes of action arose exclusively from earnings, money, chattels, and property, within the meaning of the Married Woman's Property Act, 1870, and that the defendants knew when they accepted her banking account that she was a married woman carrying on her business separately from her husband. To this replication the defendants demurred.

We are of opinion that the replication is good. The words of the section are very wide, and provide for two states of things. By the first portion of the section, the married woman may "maintain an action" for the recovery of wages, earnings, &c., and by the second portion of the section she is to have "the same remedies both civil and criminal against all persons whomsoever *for the protection and security* of such wages, earnings, &c., as if such wages, earnings, &c., belonged to her as an unmarried woman."

The question is perhaps not precisely the same on all the three counts. But, to take the third count first, it is plain that this section of the Act will become almost useless if a married woman otherwise within its provisions cannot maintain an action against her bankers for dishonoring her cheque. It does not necessarily follow, because a married woman may sue her banker for dishonoring her cheque, that the general proposition is true without qualification that she can maintain an action for damages for breach of contract. The relation of banker and customer is a peculiar one. It is that of debtor and creditor, with a custom superadded, to pay the creditor's cheques: *Foley* v. *Hill* (1), the judgments of Lord Cottenham and Lord Campbell: and it seems perfectly clear that, as far as the count for dishonoring the cheque is concerned, the plaintiff is seeking a remedy for the protection of her earnings, within the meaning of the 11th section.

The first and second counts undoubtedly raise a somewhat broader question, as they are founded upon a contract of agency. But we think that the words of the 11th section to which we have referred are sufficient to cover this state of circumstances also. To hold otherwise, would be in effect to say that a married woman could not safely have any of her earnings paid to her by bills of exchange, for that she has no protection against the negligence of the banker to whom she intrusts them.

Our decision in favour of the plaintiff under these circumstances must not be taken to affirm, nor will it affirm, the general proposition that under this Act, and without reference to particular circumstances, a married woman can contract. This remark incidentally disposes of the argument very properly drawn by Sir Henry James from the words of the 26th section of 20 & 21 Vict. c. 85, the Divorce Act.

On the whole, we are of opinion that the replication is good.

Judgment for the plaintiff.

Attorneys for plaintiff: *Reep, Lane, & Co.*
Attorney for defendants: *R. Mullens.*

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(1) 2 H. L. C. 28.

1874
July 8.

BLOOMER *v.* BERNSTEIN AND ANOTHER.

Sale of Goods—Payment of Price—Condition precedent—Insolvency.

10 CP 19
23
10 QB 325
4 Ch D. 116

Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract.

Withers v. *Reynolds* (2 B. & Ad. 882) followed.

Declaration for non-delivery of certain iron rails sold by the defendants to the plaintiff.

Pleas inter alia: Denial of the promise; that the plaintiff was not ready and willing to accept; and exoneration.

Issues.

At the trial before Brett, J., at the sittings in Middlesex after Michaelmas Term, the facts, so far as material, were as follows: The plaintiff resided at West Bromwich, and the defendants, who were merchants at Antwerp, through their agent in England, Mr. Bergheim, entered into a contract with the plaintiff for the sale to the plaintiff of "from 3650 tons to 5110 tons of old iron rails, consisting of flange and double heads, delivery to take place during 1872, and to be completed in December of that year: the prices for cost and freight to New York per ton for double heads being 5*l.* 18*s.*, and for flange rails, 5*l.* 16*s.*, payment net cash, in London, against bill of lading and sworn weigher's certificate." No provision was contained in the contract as to when during the year deliveries were to be made, but it was stated in evidence that under such a contract the usual practice would be to deliver monthly. On the 27th of January, 1872, the defendants' agent, Mr. Bergheim, sent the plaintiff an invoice for 261,538 kilos, or 257 tons double-headed rails, shipped on board the *Tamerlane*, amounting to 1390*l.* 4*s.* 8*d.*, and the plaintiff duly paid the amount of that invoice, and received the bill of lading. On the 31st of January an invoice was sent to the plaintiff for a further quantity of rails, shipped on board the *Tamerlane*, amounting to 903*l.* 11*s.* 7*d.*, but the plaintiff did not take up the bills of lading for those rails. On the 7th of February, Mr. Bergheim wrote to the plaintiff, giving him notice that unless the bills of lading were taken up before 12 o'clock on the next day they would be sold, and he would be charged with any loss incurred. The plaintiff excused himself to Mr. Bergheim for not taking up the bills of lading, on the ground that he had been engaged as a witness in a Chancery suit, and promised to make provision for taking up the bills of lading and future bills of lading under the contract, by opening a credit for that purpose with Messrs. Barclay, Bevan, & Co. But, on being again applied to to take up the bills of lading, he failed to do so, and on the 13th of February the unpaid-for rails were sold, and on the same day Mr. Bergheim wrote, informing the plaintiff of the fact, and asking him what he intended doing with reference to the remainder of the contract. The market for iron was a rising market, and consequently the rails sold for more than the contract price. On the 14th of February Mr. Bergheim again wrote to the plaintiff, stating that in consequence of plaintiff's not having taken up the bills of lading, and having thus broken the terms of the contract, he must consider the contract cancelled, and the rails would now pass to other hands. On the 15th of February the plaintiff wrote to Mr. Bergheim, stating that he should expect the rails delivered as per contract. Mr. Bergheim answered that the contract was at an end. On the 19th of February the plaintiff wrote to Mr. Bergheim, stating that if he did not deliver rails the plaintiff would buy in against him. To this Mr. Bergheim answered on the 20th of February, stating that the defendants had cancelled the contract. The plaintiff filed a petition for liquidation by arrangement with his creditors, on the 22nd of February, under the 125th section of the Bankruptcy Act. At a meeting of the plaintiff's creditors a trustee was duly appointed, and the question having been discussed between the creditors and the trustee and the plaintiff whether the creditors should take to the outstanding contracts of the plaintiff, they came to the determination that they would have nothing to do with them. It was ultimately arranged that the plaintiff should pay a composition of 2*s.* 6*d.* in the pound, to be guaranteed by certain friends of the plaintiff, and the plaintiff's estate should be re-assigned to him. In accordance with this arrangement the trustee did on the 28th of June re-assign to the plaintiff all the estate and effects vested in the trustee under the liquidation. On the 23rd of July the plaintiff wrote to the defendants' agent, Mr. Bergheim, demanding a renewal of the deliveries under the contract, which was refused on the ground that the contract had been put an end to. No demand for deliveries had been made between February and July.

The learned judge ruled that if before the alleged breach of contract the buyer was insolvent, and neglected to pay the amount payable on due presentment of a bill of lading according to the contract, the buyer could not afterwards insist upon any delivery, at all events without tendering to the sellers the price, or giving the sellers reasonable evidence that he would be able, ready, and willing to pay the price, and he left the following questions to the jury:—1. Could the plaintiff at any time from the 11th of February to the end of that year have been able to pay for the bill of lading when presented to him, in accordance with the contract? 2. Had the defendants or their agent on the 13th of February, by reason of the plaintiff's conduct, reasonable ground for believing, and did they or he believe, that the plaintiff would be unable to pay for the future bills of lading to be presented under the contract? 3. The like on the 24th of July? 4. Did the plaintiff, his trustee in bankruptcy, and creditors come to a determination to abandon the contract? 5. Did they so conduct themselves as to lead the defendants or their agent reasonably to believe that the plaintiff, his trustee, and creditors had determined to abandon the contract?

The jury answered the first question in the negative, and the remaining questions in the affirmative.

The verdict was entered for the defendants, leave being reserved to the plaintiff to move to enter it for himself for an amount to be found by arbitration, on the ground that upon the evidence the plaintiff was entitled to the verdict, and that there was no evidence to justify the judge in ruling, or the jury in finding, that the defendants were entitled to cancel the contract as they did on the 14th of February, 1873.

A rule nisi was accordingly obtained, against which

Butt, Q.C., *Benjamin, Q.C.*, and *J. C. Mathew* shewed cause. It is submitted, first, that the defendants were entitled under the circumstances of the case to rescind the contract on the 14th of February; secondly, that even if they were not, and the plaintiff might have treated their repudiation of the contract at that date as a breach of the contract, not having done so, but having subsequently insisted on deliveries under the contract, and so treated it as a subsisting contract, he cannot now treat what took place in February as a breach. In respect of any subsequent repudiation it is submitted that he clearly cannot recover after what took place under the liquidation. With respect to the second point, it is clear that the expression of an intention to break the contract in future can only be treated as a complete breach if the opposite party elects to treat it as such; he cannot insist on the fulfilment of the contract and at the same time say that it is at an end: *Avery* v. *Bowden* (1); *Hochster* v. *De la Tour* (2); *Danube and Black Sea Ry. Co.* v. *Xenos*. (3) With respect to the first point, it may be admitted that mere non-payment for one instalment of a quantity of goods to be delivered by instalments does not per se entitle the seller to repudiate the contract; and that mere insolvency would not perhaps entitle the seller to repudiate; but non-payment of an instalment, under circumstances from which the seller may reasonably conclude that the buyer does not intend or will be unable in future to complete the contract, will entitle him to repudiate: *Hoare* v. *Rennie* (4); *Simpson* v. *Crippin* (5); *Withers* v. *Reynolds*. (6) It matters not whether the buyer's conduct amounts to a declaration that he will not go on with the contract, or that he cannot. Here it is contended that the evidence shewed that the buyer's conduct was such as to induce a reasonable belief on the part of the sellers that the plaintiff could not go on, and the jury have so found. This is not like an ordi-

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(1) 6 E. & B. 953; 26 L. J. (Q.B.) 3.

(2) 3 E. & B. 678; 22 L. J. (Q.B.) 455. 17 Jur. 972.

(3) 11 C. B. (N.S.) 152; 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 84, 284.

8 Jur. N.S. 439

(1) S.C. 3 Jur. N.S. 239.

(4) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(5) Law Rep. 8 Q. B. 14.

(6) 2 B. & Ad. 882.

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nary contract for the sale of goods; the defendants had to provide ships and make themselves responsible for freight in advance, and it would be very hard that they should incur this responsibility when the plaintiff was admittedly insolvent and offered no security for future payment. Assuming that mere insolvency would not be conclusive, it is contended that under the circumstances the plaintiff was bound to give the defendants some evidence of his being in a position to take up future bills of lading under the contract.

[They also cited *Roper* v. *Johnson* (1), *Ex parte Chalmers* (2), *Planché* v. *Colburn* (3), and *Ex parte Halliday, Re Hall.* (4)]

Manisty, Q.C., *Field, Q.C.*, and *Waddy, Q.C.*, supported the rule. It is contended that what took place in February gave a vested right of action for a breach of the contract to the plaintiff. If there was then a vested right of action nothing subsequently happened that would destroy it. At that date the defendants declared their intention of not performing the contract, and the plaintiff declared that he intended to enforce it. It is submitted that there was then a clear breach of contract. At that time there was nothing due to the defendants under the contract, the rails not paid for having been sold for more than the contract price. The market was rising, and the purchaser could never in future get possession of the rails by the terms of the contract except for cash. What hardship is there under such circumstances in the seller being kept to his contract. It is admitted law that mere default in payment for an instalment of the goods does not discharge the sellers. Nor would mere insolvency be a discharge. Actual bankruptcy does not by law put an end to a contract; the trustee has an opportunity of electing to take to the contracts, and on performance of the bankrupt's part of the undertaking, to compel performance by the other contracting party of his. There is nothing in the mere fact of the insolvency to shew that a party will not be able to perform the contract in future. The insolvent may be able to make arrangements, if the contract is a valuable one, to provide for the

(1) Law Rep. 8 C. P. 167.

(2) Law Rep. 8 Ch. Ap. 289.

(3) 8 Bing. 14.

(4) 2 D. (De G.) J. & S. 312; 11 Jur. (N.S.) 817.

payments to fall due under it, and ought not to be deprived of the benefit of the contract. In determining this question, the state of things on the 20th of February ought alone to be looked to, to determine whether there existed then such circumstances as would entitle the defendants to rescind the contract. The subsequent liquidation and other circumstances ought not to be considered, for they cannot form elements in considering whether at that time the defendants were entitled to believe that the plaintiff was unable to carry out the contract in future.

[They cited *Miles* v. *Gorton* (1), *Griffiths* v. *Perry* (2), *Freeth* v. *Burr* (3), and *Frost* v. *Knight*. (4)]

Cur. adv. vult.

July 8. The judgment of the Court (Lord Coleridge, C.J., and Brett and Grove, JJ.) was delivered by

LORD COLERIDGE, C.J. This case was tried before my Brother Brett at the sittings in Middlesex after last Michaelmas Term. The learned judge ruled that if, before the alleged breach of such a contract as this by the sellers, the buyer is insolvent and neglects to pay the amount payable on the due presentment of a bill of lading according to the contract, the latter cannot afterwards insist upon any delivery, at all events without tendering to the sellers the price of the goods, or giving the sellers reasonable evidence that he would be able, ready, and willing to pay the price; and he left the following questions to the jury:—

1. Could the plaintiff at any time from the 11th of February to the end of that year have been able to pay for the bill of lading when presented to him in accordance with the contract?

2. Had the defendants or their agent on the 13th of February, by reason of the plaintiff's conduct reasonable ground for believing, and did they or he believe, that the plaintiff would be unable to pay for the future bills of lading to be presented under the contract?

3. The like on the 24th of July?

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(1) 2 C. & M. 504.

(2) 1 E. & E. 680. 5 Jur. N.S. 1076

(3) Ante, p. 208.

(4) Law Rep. 7 Ex. 111.

1874

BLOOMER v. BERNSTEIN.

4. Did the plaintiff, his trustee in bankruptcy, and creditors come to a determination to abandon the contract?

5. Did they so conduct themselves as to lead the defendants or their agent reasonably to believe that the plaintiff, his trustee, and creditors had determined to abandon the contract?

The jury answered the first question in the negative and all the others in the affirmative. The learned judge thereupon directed a verdict to be entered for the defendants,—reserving leave to the plaintiff to move to enter a verdict for him either irrespectively of, or subject to, the findings of the jury.

In the following Term, Mr. Manisty obtained a rule nisi to enter a verdict for the plaintiff, on the ground that there was no evidence to justify the judge in ruling, or the jury in finding, that the defendants were entitled to cancel the contract as they did on the 14th of February, 1873. The case was elaborately argued as to the circumstances under which one of the contracting parties has a right to treat the contract as abandoned by the other. We think that the findings of the jury in this case conclude the matter: and my Brother Brett is not dissatisfied with those findings. Those findings ascertain that a state of things existed which justified the defendants in believing that the contract was intended by the plaintiff to be put an end to. The case therefore falls directly within the authority of *Withers* v. *Reynolds* (1), and the verdict for the defendants must stand.

Rule discharged.

Attorneys for plaintiff: *Peckham, Maitland, & Peckham.*
Attorney for defendants: *W. A. Crump.*

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(1) 2 B. & Ad. 882.

MAVRO AND ANOTHER *v.* THE OCEAN MARINE INSURANCE COMPANY.

1874
July 8.

Marine Insurance—" General Average as per foreign Statement"—" Warranted free from Average unless general"—Voyage broken up before Arrival at Port of Destination.

A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term, " general average as per foreign statement." The ship after starting from Varna met with heavy weather, and was forced to carry a great press of canvas to avoid a lee shore. This caused her to strain very much, and having sprung a leak, and become otherwise disabled, she was brought into the port of Constantinople. Proceedings were taken in the Consular Court of Constantinople by the owner of the vessel, and a survey was made of the ship by direction of that Court. It was found that a fifth part of the wheat had been damaged, and the surveyors recommended that the voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. An order of the Court to that effect was accordingly made, and an adjustment of average in respect of ship and cargo was also made by order of the Court at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. In an action on the policy by the owners of the wheat the defendants paid into Court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the damage to the wheat, which, under the circumstances, by the law of England would not be a general average loss :—

4 C.P.D. 33
332 "
54 B.D. 28

Held, on a special case stated in the action, by which the Court were to draw inferences of fact, that the Consular Court of Constantinople had jurisdiction to make the order which they made, and that the voyage was necessarily brought to an end at Constantinople, and that under these circumstances the defendants were bound by the average statement at Constantinople, and were liable to the plaintiffs in respect of the damage to the wheat.

Harris v. *Scaramanga* (Law Rep. 7. C.P. 481) and *Hendricks* v. *Australasian Insurance Co.* (ante, p. 460) followed.

Affd in Ex Ch. L R 10 C P 414

This was an action on a policy of insurance on wheat and advances, valued at 9200*l.*, at and from Varna to Marseilles, on board the vessel, *General Chassé*. In the declaration the plaintiffs sought to recover, first, a general average loss; secondly, a total loss; and thirdly, a loss under the suing and labouring clause in the policy contained. The defendants paid into court the sum of 110*l.*, which sum the plaintiffs denied to be sufficient to satisfy their claim. A special case had been stated in the action as follows:—

1. The plaintiffs carry on business as merchants and brokers in London and Marseilles, and the defendants are an insurance company carrying on business in London.

2. In September, 1867, Mr. Lovrono, who was a Greek merchant domiciled at Constantinople, and who was desirous of consigning to the plaintiffs at Marseilles for sale a cargo of 29,156 kilos of wheat belonging to him, chartered the vessel *General Chassé*, which was a British vessel belonging to Guiseppe Saliba, a Maltese subject resident at Constantinople, to carry the said cargo of wheat from Varna to Marseilles, and caused the same to be shipped on board the said vessel at Varna, about November, 1867. Mr. Lovrono also made advances to the master of the *General Chassé*, amounting to the sum of 149*l.* 1*s.* 9*d.*, on account of freight payable under the charterparty. The plaintiffs and the said Lovrono were jointly interested in the adventure relating to the said cargo of wheat.

3. On the 22nd of November, 1867, the plaintiffs effected with the defendants a policy of insurance for 1000*l.* This insurance is declared to be "upon 29,156 Constantinople kilos wheat and advances valued at 9200*l.*, general average as per foreign statement, on the ship *General Chassé*, at and from Varna to Marseilles," and it is also declared to be warranted free from average unless general.

4. On the 6th of November, 1867, the *General Chassé*, with the said cargo of wheat on board, sailed from Varna for Marseilles. Very soon after leaving port she encountered heavy gales and thick weather, which continued for some hours before she came to anchor in the Bosphorus as hereinafter mentioned. In fine weather the vessel would have taken from four to five days to have made the voyage to the Bosphorus.

5. On the 7th of November, during a heavy gale from the north, it became necessary on account of the vessel nearing land, that she should carry a press of sail in order to prevent her making further lee way. This was accordingly done, and in consequence the vessel laboured very much and shipped heavy seas, which carried away the jolly boat and other parts of the vessel's apparel

and furniture. It was also found necessary to throw overboard sundry articles which were on deck in order that the working of the ship might not be impeded. The next day there was a strong gale from the north, and as the vessel got very near the land it became necessary, for the safety of ship and cargo, that a still further press of sail should be carried in order to avoid a lee shore; more canvas was accordingly set. This caused the *General Chassé* to strain very much; several of her sails were split and carried away and she soon sprang a leak. The leak was however kept under by pumping, wheat being constantly pumped up with the water.

6. On the 24th of November the *General Chassé* was brought to anchor at Bajuk Limon in the Bosphorus, and on the following day, having been taken in tow by a steam tug, which it was necessary to employ by reason of the vessel's damaged and disabled condition, she was brought to anchor at Tophate in the port of Constantinople.

7. On the 27th of November, the master of the *General Chassé* petitioned the judge of Her Majesty's Supreme Consular Court of Constantinople to appoint surveyors to survey the vessel, and accordingly surveyors were appointed by the Court, who, on the 28th of November, 1867, surveyed the vessel in the presence of the said Guiseppe Saliba, her owner, and Mr. Lovrono, and recommended that the voyage of the vessel should end at Constantinople, and that the cargo of wheat should be sold by public auction for the benefit of all concerned. Thereupon the master petitioned the Court that an order might be made for the immediate sale of the cargo by public auction, and this order was made on the same day.

8. On the 2nd of December, Fortune Jourdain, agent of the Assurances Maritimes de France prayed the said Court for leave to intervene in the proceedings on the ground that the cargo was insured in his company. Such leave was accordingly granted to him, and upon his application the sale of the cargo was suspended and a fresh survey ordered by the Court.

9. On the 7th of December, Mr. Henry Lamb petitioned the said court for leave to intervene in the proceedings as agent for the Maltese underwriters, and leave was granted on the same day; also Mr. Hopper, Lloyd's agent, addressed a petition to the said

Court stating that he approved of the steps taken by M. Jourdain, and praying that as agent for Lloyd's he might attend the fresh survey, and his prayer was likewise granted.

10. On the 10th of December, the fresh survey took place in the presence of the surveyors and Messrs. Jourdain and Hopper. It was found that about one-fifth part of the cargo of wheat was damaged, and it was recommended by the surveyors that the sound portion should be at once transhipped and the damaged portion sold by public auction.

11. The damage which the cargo was found as aforesaid to have sustained (so far as could be ascertained) had been caused by the *General Chassé* having carried a press of sail, and by her having consequently strained and shipped heavy seas and sprung a leak, under the circumstances above mentioned.

12. After the said survey of the 10th December, Messrs. Lovrono and Hopper petitioned the court to order the damaged portion of the cargo to be sold and the sound portion to be transhipped, and the court, having made an order in accordance with such petition, the damaged wheat was sold by public auction, and the undamaged wheat was in the beginning of January, 1868, transhipped on board an Austrian vessel, the *Francisca M.*, in which it was safely conveyed to Marseilles, its original port of destination.

13. There were no public warehouses or docks at Constantinople for warehousing wheat. There was no evidence to shew what it would have cost to have warehoused the wheat in private warehouses. It was also uncertain whether it would have taken one or two months after the discharge of the cargo to have repaired the *General Chassé*, on account of the difficulty in procuring a proper berth for the vessel at Constantinople, and also on account of the possibility of bad weather interfering with the repairs. Under these circumstances it was considered advisable to tranship the sound wheat as aforementioned. It was also considered advisable to sell the damaged wheat, because it could not be transhipped together with the sound wheat without damaging the latter, and because it was not worth transhipping separately.

14. The *General Chassé* was afterwards repaired at Constantinople, and on the 2nd of February she was fit to proceed to sea with cargo.

15. On the 3rd March, 1868, Mr. Lovrono petitioned the court to appoint average adjusters to adjust the averages in respect of the *General Chassé* and her cargo, and to ascertain the contribution due from the parties interested.

16. The Court accordingly appointed average adjusters. They were sworn by the learned judge of the said supreme Consular Court, and proceeded to hold meetings in the building of the court. At these meetings Mr. Lovrono and Messrs. Jourdain and Hopper were present, and they or their counsel were heard in support of their respective claims and contentions; but there was no agent of the defendants present.

17. During the discussion before the average adjusters, the question having arisen as to the law by which the average adjustment ought to be governed, it was submitted to the learned judge of the Court, who decided that it ought to be governed by the law of France, as being the country to which the port of destination of the cargo belonged.

18. In pursuance of this decision the average adjusters made up the average adjustment according to the law of France, and such average adjustment was afterwards registered in the Court and homologated by a decree of the Court.

19. The law by which the average adjustment ought to have been regulated according to the law and usages prevailing at Constantinople and applicable to the *General Chassé* and her cargo, under the circumstances of the case, was the law of France, and the said average adjustment was made up in all respects in conformity with such law.

20. Assuming that Her Majesty's Supreme Consular Court could acquire jurisdiction over the aforesaid matters by force of custom, there was not sufficient evidence of such custom to prove that it had in this matter acquired jurisdiction; but the plaintiffs rely on the documents marked B, which are contained in the appendix and are to form part of the case, for the purpose of establishing that the Court had jurisdiction.

21. In the said average adjustment the damage, which the cargo of wheat had sustained as aforementioned, was treated as general average, and the sum payable by the defendants under the

policy sued on, in accordance with the said average adjustment, would be 275*l.* 14*s.* 6*d.*

22. The defendants contend that they are not liable in respect of any damage to the wheat, and that they have paid into Court sufficient to cover the plaintiffs' claims in respect of other items contained in the said average adjustment, except the item representing the damage to the wheat.

23. The Court is to be at liberty to draw inferences of fact.

The question for the Court was whether the defendants were liable as aforesaid to pay the plaintiffs a sum exceeding that paid into court.

The documents marked B were an order in Council, dated the 9th of June, 1863, for the regulation of the consular jurisdiction in the dominion of the Sublime Ottoman Porte, and certain rules of the supreme Consular Court in such dominions, dated the 23rd of January, 1863, and also an order in council dated the 30th of November, 1864, relating to the Consular Court of Constantinople.

Watkin Williams, Q.C. (with him *McLeod*), for the plaintiffs. It is admitted that the damage caused by putting on a press of sail to get off a lee shore is not general average by the law of England. But according to the law of France, which was applied at Constantinople, as being the law of the place of destination, it is. It is admitted that, although the law of France was applied, the adjustment was different at Constantinople with respect to amounts from that which it would have been at Marseilles. Unless the adjustment, therefore, was rightly made at Constantinople, the plaintiffs must fail; but it is submitted that it was rightly made there, and the underwriters are liable according to the terms of the policy. In general, no doubt, general average is to be adjusted according to the law of the place of destination: *Simonds* v. *White.* (1) But if the ship is wrecked on the way and the adventure comes to an end, it must be adjusted at the place of wreck or that which the cargo reaches in safety: *Fletcher* v. *Alexander.* (2) In the present case the ship is compelled by the perils of the sea to put into a

(1) 2 B. & C. 805.

(2) Law Rep. 3 C. P. 375.

port of refuge, and the adventure is abandoned, and the ship and cargo part company. The abandonment of the adventure is upon the best advice of competent surveyors, all parties interested in the adventure concur, and the course taken is that directed by the order of the Consular Court. There was no need for the underwriter's concurrence.

[BRETT, J. Could you contend, if the freighters and shipowners wrongly came to the conclusion that it was better that the adventure should be abandoned, they could thereby throw the onus of a different law of adjustment on the underwriters?]

The shipowner might have elected to repair the ship and carry on the goods, but he was not bound to do so, being excused by the perils of the sea: *Worms* v. *Storey* (1); *Blasco* v. *Fletcher* (2); *De Cuadra* v. *Swann.* (3)

[BRETT, J. According to *Benson* v. *Chapman* (4) the duty of the master is to try to carry out the adventure, if it be practically possible, and unless the expense would be ruinous.]

Assuming that to be so, that is as between the shipowner and the freighter. If all the parties choose on reasonable and prudent grounds to close the adventure, at what place can the general average adjustment be made but the place where the ship and cargo part company? The underwriter who has undertaken to indemnify the owner of the goods against general average as per foreign statement is bound by the statement when it is made at a place where, without improper motives and in the reasonable course of business, the adventure was terminated by the parties interested. It is not necessary to say in the present case that, by mere mutual agreement of the parties to the adventure to terminate it before the place of destination, the place of adjustment could be altered as against the underwriters; it is contended that under the circumstances of the present case they were justified in so terminating it.

It is submitted that this case is in fact concluded by *Harris* v. *Scaramanga.* (5)

(1) 11 Ex. 427; 25 L. J. (Ex.) 1.
(2) 14 C. B. (N.S.) 147.
(3) 16 C. B. (N.S.) 772.
(4) 2 H. L. C. 696.
(5) Law Rep. 7 C. P. 481.

[He also cited *Messina* v. *Petrocochino* (1) and *Hendricks* v. *Australasian Insurance Co.* (2)]

Butt, Q.C. (with him *J. C. Mathew*), for the defendants. The circumstances of this case did not entitle the owners of the cargo to agree to put an end to the adventure and make up the average adjustment at Constantinople, so as to bind the defendants. The opinion expressed by Parke, B., in *Worms* v. *Storey* (3), that the shipowner is not bound to repair the ship and proceed with the adventure is only a dictum, and cannot be supported. There is nothing stated in the case to show that the wheat could not have been warehoused in private warehouses, and the ship was repaired and did sail in two months. The case does not find that there was any necessity for the course adopted. It is contended that, in order to justify the adjustment of the average at any other place than that of destination, there must be an inexorable necessity for the termination of the adventure, as in the case of a wreck. The wheat that was sold was sold by reason of the damage to itself, not to the ship; and the fact that it was necessary to sell it at Constantinople did not make it necessary to adjust the average there. If the ship and bulk of the cargo go on, it ought to be adjusted at the place of destination.

[BRETT, J. It is stated that the Consular Court ordered the damaged wheat to be sold, and the rest to be transhipped, which certainly seems rather a strong order to make.]

The order must be taken to have been made with consent of the parties; it cannot be that the Court could compulsorily make such an order.

The jurisdiction of the Consular Court is only by custom, at any rate so as to bind third parties. The orders in council regulating its jurisdiction expressly confides to it only such jurisdiction as it previously had by custom. It is expressly found that there was no evidence to shew that the Court had any such jurisdiction as it claimed here to exercise by custom, which is equivalent to finding that they had no such jurisdiction, inasmuch as the Court will not presume the existence of such a custom.

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(1) Law Rep. 4 P. C. 144.

(2) Ante, p. 460.

(3) 11 Ex. 427; 25 L. J. (Ex.) 1.

[BRETT, J. They appear to have the jurisdiction of a Court of Vice-Admiralty.]

There is no jurisdiction in the Court of Admiralty to compel a transhipment of goods: *Power* v. *Whitmore.* (1)

It is further contended that on the wording of this contract the defendants have paid all that they were bound to pay. The case of *Harris* v. *Scaramanga* (2) is altogether distinguishable from the present. The defendants have not refused to pay any sum imposed on the plaintiffs by a foreign average statement. They have paid all sums of money which the plaintiffs were obliged to pay by the average statement at Constantinople. What the plaintiffs are now seeking to recover is in respect of the loss on the wheat, which clearly by English law would be their own loss as a particular average. The fact that according to the foreign average adjustment this would be a general average loss is immaterial. The meaning of the contract is that the insurers give an additional indemnity against any loss the assured may sustain by reason of a foreign average adjustment. It does not mean that they will pay for anything which, according to the view of the foreign average adjusters, is general average.

The policy contains the usual warranty against average, unless general, which would ordinarily mean general average according to the English law. That clause must be construed with the provisions as to foreign adjustment. The construction suggested by the defendants gives full effect to both. The reason for the insertion of the latter term in policies was that it was well known that insurers frequently suffered losses by being compelled to pay sums of money in consequence of foreign average adjustments which they would not otherwise have had to pay, and it was against such losses that an indemnity was intended to be given in addition to ordinary losses by perils insured against. It was not intended that all losses which by the foreign law are general average should be insured.

Watkin Williams, Q.C., in reply. The contract is to pay according to the foreign mode of adjustment. It does not matter whether the loss to the plaintiffs is by reason of having to contribute according to the foreign law or by having to bear their own proportion of the loss. [He cited *Dickenson* v. *Jardine.* (1)]

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(1) 4 M. & S. 141.

(2) Law Rep. 7 C. P. 481.

Cur. adv. vult.

July 8. The judgment of the Court (Lord Coleridge, C.J., Mellor and Brett, JJ.) was delivered by

LORD COLERIDGE, C.J. This was an action on a policy of insurance on a cargo of wheat. The ship, being disabled and some of the cargo damaged, put into Constantinople. Proceedings were taken in the consular court there, the result of which was, that by the order of the Court the damaged portion was sold and the sound portion transhipped. The entire cargo belonged to the plaintiffs; an adjustment of average was, by order of the Consular Court, made at Constantinople, in which the average adjuster treated the damage to the wheat as general average. The policy contained the words "general average as per foreign statement," and "free from average unless general." The defendants have paid into court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the item for damage to the wheat. This item they deny their liability to pay. They relied mainly upon three points:—1. That the Consular Court at Constantinople had no jurisdiction to make the orders which were made in this case. 2. That the voyage was not necessarily broken up at Constantinople, and that the average should have been adjusted by an adjuster at Marseilles, upon the arrival of the ship and goods in safety there. 3. That the words "free from average unless general" were intended expressly to exclude such an item as the one in dispute, which by the law of England would not be a general average loss at all.

By the 23rd paragraph of the case the Court is to draw inferences of fact, and this enables us easily, and, as we think, satisfactorily, to dispose of the first two points in the case. We are clearly of opinion, upon the facts stated in the case, that the Court at Constantinople must be taken to have had jurisdiction to make the orders which it did, and which were acquiesced in at the time.

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(1) Law Rep. 3 C. P. 639.

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We are also clearly of opinion, upon the facts found in the case, that it must be taken that the voyage was necessarily broken up at Constantinople. Some reliance was placed in argument upon the fact that the law of Marseilles, the port of ultimate destination, was the same on the subject of general average as the law of Constantinople. But this fact alone would not be conclusive of the subject, and we notice it only to shew that we have not overlooked it. There remains only the question upon the true construction of the policy; and with respect to this, the cases of *Harris* v. *Scaramanga* (1) and *Hendricks* v. *Australasian Insurance Co.* (2) appear to us to be undistinguishable. The latter case was very recently argued before us, and we adhere to the opinion we then expressed. We think, therefore, that there should be judgment for the plaintiffs.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Nash.*
Attorneys for defendants: *Waltons, Bubb, & Walton.*

YATES AND OTHERS, PETITIONERS; LEACH AND ANOTHER, RESPONDENTS.

May 28.

10 CP 714
71 J 728

Municipal Election—Petition—Striking out Respondent's Name—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict.* c. 60), ss. 17, 18.

At a municipal election, A. and B. were candidates for the office of town councillor. A. obtained a majority of thirty-five votes over B., and was declared elected, but, being disqualified, refused to serve. B. thereupon claimed to have been elected, and having made the requisite declaration, acted on several occasions as town councillor. A petition being presented under the Corrupt Practices (Municipal Elections) Act, 1872, to which both A. and B. were made respondents, they both gave notice, under s. 18 of the Act, of their intention not to oppose the petition. No notice of A.'s disqualification was given to the electors before the election. On an application by B. to the Court that his name might be struck out of the petition:—

The Court refused the application on the ground that he was properly made a respondent.

THIS was a petition under the Corrupt Practices (Municipal Elections) Act, 1872. Application was made on behalf of the respondent Leach to strike his name out of the petition, under the following circumstances. The election to which the petition related was an election to the office of a town councillor, at Oldham. The two respondents, Leach and Milnes, were candidates. Milnes was declared elected by a majority of thirty-five, but immediately after the election he was advised that he was disqualified, on the ground that he was interested in a contract with the corporation, and refused to take the declaration required by the Municipal Corporations Act, or to act. The respondent Leach, who had been in the minority, then applied to the town clerk to receive the declaration from him, that he might act as town councillor. The town clerk refusing to do so, he went before another officer and made the declaration, and acted on certain occasions in the office. The petition was then presented against the respondents, alleging that Milnes was disqualified, and that Leach was not elected by a majority. Thereupon both the respondents gave the notice provided for by the 18th section of the statute, declaring their intention of not opposing the petition. Leach refused, however, to resign the office.

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(1) Law Rep. 7 C. P. 481.
(2) Ante, p. 460.

A rule nisi having been obtained to strike out Leach's name,

J. O. Griffits shewed cause. The respondent Leach is de facto in occupation of the office, which is therefore full, and a mandamus would not lie to proceed to a fresh election. If his name were struck out of the petition, the office would remain full, inasmuch as he refuses to resign. The only mode of vacating the office other than by a petition, is by quo warranto, and the 12th section of the Act expressly provides that no such proceedings as quo warranto shall be taken as to any matter in respect of which there might have been a petition. It is submitted that Leach was properly made respondent under the Act.

He is precluded from saying that he ought not to be a respondent, for he has accepted the position by giving notice under the 18th section. The effect of that section is not that the respondent shall cease to be respondent upon giving notice, but only that he shall not be allowed to appear. Another person may come forward and be made respondent.

Douglas Walker supported the rule. The only person who can be made respondent under the 13th section of the Act is a person who has been de facto elected and declared elected. Leach never was elected nor declared to be elected. He is a mere intruder upon the office, as much as if he had never been a candidate at all, or, being a candidate, had no votes. The purpose of the Act is, where a person has apparently been duly elected, to investigate into the character of the election, to ascertain whether it was valid or not. It was not intended that there should be a petition in such a case as this. The proper remedy is by quo warranto. Even if Leach was properly made respondent originally, there is no object now in the proceedings, both respondents having disclaimed any claim to the office. It is a useless expense that the barrister should go down to try the petition when there is really nothing to try.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. The applicant, Mr. Leach, who has claimed to have been returned at the election as a town councillor, and has acted as such, and who, as I understand, refuses to resign, so as to allow the office to become vacant by any act of his own, now applies that his name may be struck out of the petition. Such a petition is the only way, except the troublesome and expensive process of quo warranto, by which the office, being actually full, can be vacated so that there may be a fresh election. It is clear that if the applicant is put to costs in the matter, he has brought it on himself. He has claimed the office without any reasonable ground, and finding he was wrong, he wishes to avoid any possible loss to himself. The chief ground put forward for this application was, that he was not properly made a respondent within the meaning of the Act 35 & 36 Vict. c. 60. We have been referred to the interpretation of the term "respondent" in the 13th section. And it was argued that, as Mr. Leach was never elected, there could not properly be a petition against his election. It appears to me that the meaning of the term, as interpreted, includes a person who claims to be elected and acts as if he had been, and that the applicant was therefore properly made a respondent in this petition. It was further urged that even if he was properly made a respondent in the first instance, the 18th section entitled him to make this application. That section, however, does not enact that the person giving notice that he does not intend to oppose the petition shall cease to be a respondent, but only that he shall not be allowed to appear or act as a party. It assumes that the petition will go on and the proceedings take place, the the respondent still continuing to be such, but that, having given the notice, he will not be able to take an active part in them. There is, therefore, no ground for this application. I have no doubt, however, that, under the 5th subsection of the 21st section, we have power to strike out the name of a respondent improperly made such. A good deal was said about the inconvenience and unnecessary expense of the barrister's going down to try the petition under the circumstances of the present case. The provisions of Acts of Parliament are sometimes justly made the subject of complaint, but when one bears in mind the expensive and dilatory nature of the former procedure by quo warranto, one cannot see that there is very much to complain of in the provisions of the present Act. The barrister will go down, and, no one resisting the petition, the whole proceedings will take a very short time, and no very great expense will be incurred.

BRETT, J. The question is, whether we ought to strike out the respondent's name on the ground that he was improperly made respondent. It is argued that he was so because the only proper person to be made respondent is a person elected, and he never was elected or declared elected. This argument was based upon the definition of a "respondent" in the 13th section. I think we have power to strike out the name of a person improperly made respondent, but I do not think that the applicant was improperly made respondent. The definition in the 13th section cannot mean "a person against whose election, &c.," in the sense that he is duly elected, for the very ground of the petition is that the respondent is not; but it seems to me that it must mean a person who assumes to be elected. It seems to me tolerably clear that Mr. Leach, or those who advised him, thought that the votes given for his opponent were thrown away, and that therefore he was duly elected by a majority of lawful votes. The answer to that, on the part of the petitioners, is, that no notice having been given of the disqualification of Mr. Milnes, the votes given for him were not thrown away. I do not see, under the circumstances, that Mr. Leach was improperly made a respondent to the petition, and I therefore think this application should be refused. It was urged that it was an idle and expensive ceremony that the barrister should go down to declare void that which everybody concerned has admitted was void. It appears, however, that this is the only way in which, under the Act of Parliament, the election can be got rid of, and the office vacated, so that a new election may be held.

Grove, J. I am of the same opinion. I think that the respondent was rightly made such within the meaning of the 13th section, and that the definition of "respondent" in that section applies to a person who claims to be elected and acts as if he were. With regard to the 18th section, it either has itself the effect of removing the person giving the notice provided for therein from the proceedings, and the application is unnecessary, or, if it has not, then we must assume there was some reason for that effect not being given to it. I do not think we ought to interfere when our interference is either superfluous or will add, as a result of the notice under the section, something which the legislature has not provided.

Rule discharged.

Attorneys for petitioners: *Gregory & Rowcliffes.*
Attorneys for respondent Leach: *Chester & Urquhart.*

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In re BOSTON ELECTION PETITION.
MALCOLM, Petitioner; PARRY and INGRAM, Respondents.

Parliament—Election Petition—Scrutiny—Bribery—Striking off Votes—Ballot Act (35 & 36 *Vict. c.* 33), *s.* 25—*Voter "so bribed"—Primâ facie case—Evidence.*

At the trial of an election petition it was proved that P., one of the candidates, had, through his agent, been guilty of a corrupt practice under the following circumstances.

About the 2nd of December, 1873, he declared himself and was accepted by the Liberal party as a candidate for a borough at the next general election. About the end of December, he determined to make a distribution of coals among the poor of the borough, and such distribution was effected as follows. Persons were sent round to the houses of those who were thought likely to accept a gift of coals, to ask if they were willing to accept a bag of coals from Mr. P., and those who replied in the affirmative received a ticket or order upon a coal merchant for coals. P.'s political agent acted in the distribution, and the tickets were signed by him, and were indorsed with the words, "With Mr. P.'s compliments." In many cases the persons selected as donees were voters who were not objects of charity, some of them being small shopkeepers, and others 10*l.* householders. The number of voters so receiving coal bore a very large proportion to the whole constituency. P.'s agent intended by the distribution of coals so made to influence the votes of the donees, and several of the persons who acted in the distribution of tickets canvassed the electors for P. A dissolution occurring in January, P. stood for the borough, and, having been elected, was petitioned against by a rival candidate, and the petitioner claimed the seat. The above facts were proved at the trial of the petition, and none of the voters who had received the coals having been called in opposition to the petitioner's case, it was contended on his behalf, on a scrutiny, that under the 25th section of the Ballot Act, 1872, a vote must be struck off the poll of the sitting member for every voter who received such coals, whether he acted corruptly in receiving them or not: it was likewise contended that even if the true construction of the section required that the voter should have received the coal corruptly, the above facts constituted a primâ facie case of corruption against the voters, upon which, in the absence of evidence in rebuttal, the votes might be struck off. The election judge reserved the question whether these contentions were correct for the Court:—

Held, upon a special case stated by the election judge, by Lord Coleridge, C.J., Brett and Grove, JJ., (Brett, J. doubting), that there was a primâ facie case of corrupt practices against the voters, in the absence of any explanation by them, sufficient to justify their votes being struck off, and that the petitioner was entitled to the seat upon a sufficient number of such votes being struck off to put him in a majority.

Per Lord Coleridge, C.J., and Brett, J. The vote can only be struck off under the 25th section of the Ballot Act when the voter has acted corruptly.

Case stated by Grove, J., for the opinion of the Court of Com-

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mon Pleas under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125) s. 12, of which the following were the material facts:—

At the last Parliamentary election for the borough of Boston, William James Ingram and Thomas Parry were returned. A petition against their return was duly presented, and was heard before Grove, J.

Mr. Thomas Parry, of Sleaford, declared himself a candidate for the borough of Boston at the next general election, and was adopted as such by the Liberal party on or about the 2nd of December, 1873.

About the end of December, 1873, Mr. Parry determined to give away about 230*l.* in coals among the poor in Boston, and wrote a letter to Mr. Wright, an alderman of the borough, of which the following is a copy:—

"My dear Mr. Wright,—I have been in the habit of sending a small gift to your mayor, and also to the vicar, about this time of the year, but the weather has become suddenly so seasonable and sharp, that I think I can best help the poor people by a direct gift of coal. My trouble is in the arrangements needful to such an end, and in finding friends willing to interest themselves to distribute 100 or 120 tons of household coals at once. The selection of recipients need not be political, nor confined to these; mankind, widows, and deserving people of all classes may be thought of. I do not mind if you go up to 150 tons, but that will be my limit. Harris, if he be in the coal trade, may supply a third, unless you can propose to me any other better process. Lester Daulton, I think, is in the coal trade, and he might supply some. You will, perhaps, enlist some persons to help you, and issue tickets, or take other means to carry out the gift to warm poor people's firesides. This need not be made public, nor, as I have said, need it be political. Dyer will help, and so, I think, will Mr. and Mrs. Bailey. Do the best you can. Distribute the coal, and send the accounts to me.—Yours faithfully, Thomas Parry. P.S.—I should like to know the names of the people you intend to deal with. Maltby is a coal merchant, is he not?"

The coals were distributed by means of tickets ordered by Thomas Wright, and bearing the signature of Benjamin Bissell

Dyer, and circulated with his knowledge. The coals were distributed by, amongst others, John Falkner and George William Thomas, who were all engaged in canvassing for the respondent, Thomas Parry, to procure his return at the said election.

The mode of distribution was as follows. Persons were sent round to the houses in Boston of those who were thought likely to accept a present of coals, to ask if they were willing to accept a bag of coals from Mr. Parry. If they replied in the affirmative, their names were taken down in a book, and they were told that they would receive a ticket. Between the 14th of January, 1874, and the day of the dissolution the tickets were distributed, and were in the following form:—

"Mr. (name of a coal merchant).
"Please deliver to (name of donee)
10 stones of coals.

"For Thomas Parry, Esq., Sleaford.
"(Delivered free.)
"B. B. Dyer."

On the back of the tickets were the words, "with Mr. Parry's compliments."

B. B. Dyer was the said Benjamin Bissell Dyer, Mr. Parry's political agent. Mr. Dyer did not know that the cards were being printed with his signature attached, but he knew that they were distributed with his name upon them. In many cases the persons selected as donees were not objects of charity, some of them being small shopkeepers, and others having votes in respect of the occupation of premises exceeding 10*l.* in annual value, and in many cases the donees were electors. Mr. Parry was not aware of the mode of distribution adopted. The coals were given by the respondent Thomas Parry's said agent in order to influence the votes of the donees, and several of the persons who were employed to ascertain if the intended donees were willing to accept the coals and to deliver the coal tickets, canvassed the electors on behalf of the respondent Thomas Parry. The nomination was on the 29th of January, 1874, when William James Ingram, Thomas Parry, John Wingfield Malcolm, and Thomas Collins, were nominated as candidates. The polling was on the 3rd of February following,

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when the numbers of votes were recorded as follows: Ingram, 1572; Parry, 1397; Malcolm, 996; Collins, 676.

Mr. Malcolm was petitioner in the said petition, and claimed the seat.

The judge found that Mr. Parry through his agents had been guilty of corrupt practices and must be unseated. Mr. Malcolm, by his counsel, then proceeded with the scrutiny and under the 25th section of the Ballot Act, 1872, claimed to strike off from the number of votes appearing to have been given for Mr. Parry one vote for every person who voted at such election and was proved to have received coals as above stated, without further proof that the donees had received them corruptly or knew that they were corruptly given, and without ascertaining for whom such voters had voted under rule 41 of the Ballot Act. If the petitioner was entitled so to do it was proved that a sufficient number of votes could be struck off to place Mr. Malcolm in a majority over Mr. Parry.

The question for the opinion of the Court was whether he was so entitled.

The parties agreed that the judge might report further to the Court if required upon the argument.

Giffard, Q.C. (with him *Thesiger, Q.C.*, and *Cave*), for the petitioner. By the 25th section of the Ballot Act, 1872 (35 & 36 Vict. c. 33), where a candidate is proved to have been guilty by himself or by any person on his behalf of bribery, treating, or undue influence at an election, in respect of any person who voted at the election, on a scrutiny one vote for every person who voted at such election and is proved to have been so bribed, treated, or unduly influenced is to be struck off. It is contended that there need not be any corrupt receipt of the bribe on the part of the voter in order that this section should apply. In the case of undue influence, in which case the section also applies, there is no default on the part of the voter. The object of the 25th section was to inflict a penalty on the candidate guilty of bribing, and the scheme seems to be that, by way of additional penalty and without inquiring which way the voter voted, the vote is to be struck off. By 17 & 18 Vict. c. 102, s. 2, the offence of bribing was made complete without any corrupt receipt of the bribe by the voter; so within the definition of bribery as given by that Act there may be bribery without any person being bribed. "So bribed," refers to the bribery mentioned in the former part of the 25th section, which clearly is only bribery on the part of the candidate. If the opposite contention be true, the word "bribe" is used in a different sense in the two parts of the section.

It is also submitted that there was a primâ facie case here on which, in the absence of evidence in rebuttal, the judge ought to find that the voters did receive the coals corruptly. He was entitled to take into consideration the fact that the voters themselves were not put into the witness box. On the proof of the facts as stated in the case the onus was thrown on the voters of establishing their innocence of corrupt motives in receiving the coal.

O'Malley, Q.C. (with him *Chandos Leigh* and *Le Marchant*) appeared for voters who had received coals.

[His right to appear was doubted by the Court, but Mr. Giffard for the petitioner not objecting, it was agreed that he should be heard as a matter of grace and not of right.]

There was no evidence here at all of the voters having received the coal corruptly. If this were a criminal trial of them for bribery could it be contended that there was any evidence to go to the jury?

[LORD COLERIDGE, C.J. A criminal trial is hardly a good test; for there their mouths would be closed, whereas here they might have gone into the witness box and explained their conduct.]

It is submitted that a man is not bound to explain until there is a primâ facie case against him. The law of evidence is the same as to both civil and criminal cases, and what would be no evidence in one would be none in the other. It might well be that many of the voters did not know when they received the coals that Mr. Parry was a candidate. It cannot be contended that the simple fact of receiving the coals was bribery on the part of the recipient. What more is there here? If the evidence is equally consistent with either of two states of things it is no evidence to go to the jury of bribery. Many of the voters might not be present at the trial or prepared to defend their votes. It cannot be for the Court to say whether the voters were guilty of corruption:

that is a matter for the judge, and he has not found in the case that they were. It was never intended to raise this point at the trial. The only point was as to the construction of the 25th section of the Ballot Act. The judge is bound under the 14th clause of the 11th section of the Corrupt Practices Act, 31 & 32 Vict. c. 125, to report the names of all the persons proved at the trial to have been guilty of corrupt practices. Can it be contended that on evidence such as this he could schedule the names of the voters struck off? But he cannot strike them off without being bound to schedule them.

[GROVE, J. He may make a special report when the circumstances require it.]

The construction of the 25th section of the Ballot Act contended for by the petitioners cannot be supported. [He was stopped on this point by the Court.]

LORD COLERIDGE, C.J. The questions that were raised upon the facts as stated in the case are, first, whether on the true construction of the 25th section of the Ballot Act, the voters who received the coals, assuming that they did not receive them corruptly, were to be considered upon the evidence given as persons bribed within the meaning of that section; and, secondly, if the construction of the section were against the petitioner's contention on the first point, whether there was sufficient evidence, unless rebutted by counter evidence on the part of the voters, of their having been in fact bribed, that is to say of their having received the coals with a corrupt intention. I will discuss the latter point in the first instance. The question is whether, assuming that the Act requires that not only the act of bribery on the part of the giver of the bribe, but also a corrupt receipt of the bribe by the voter, should be proved before the vote can be struck off, enough appears in this case to justify the judge in finding that there was such a corrupt receipt. I am of opinion that there was sufficient evidence for this purpose. Eight hundred and seventy seven persons are admitted to have received this coal. The parliament at the time was an old parliament, and Mr. Parry had declared himself a candidate, and had been accepted as such by the Liberal party, in December. Soon after such declaration and acceptance of him as a candidate this distribution of coals takes place by means of tickets, signed for him by his political agent, and the persons who go round to ask if the coals would be accepted, at or about the same time canvas the recipients on his behalf. In the borough of Boston there are 2500 constituents, and about 877 persons received these presents. It appears to me that this is, I will not say abundant, though as far as my personal opinion goes I am inclined to think so, but at any rate sufficient, evidence of a corrupt receipt of the bribe if it be necessary. Then I understand that the further circumstances are these. It was agreed between the parties that the question whether there was any evidence of the corrupt receipt of the bribe should be referred to and decided on by the Court, and it was pointed out to the counsel for the voters, or at any rate for a large number of the voters, that it might turn out to be the view of the Court that though the evidence was not necessarily conclusive, it was such as called on the voters for a reply, and if so, the question being referred to the Court, their decision would be conclusive against the voters. It was not denied by the learned counsel that the understanding was as stated. I am of opinion that there was evidence calling for a reply on the part of the persons whose conduct was impugned in receiving these coals, and who were interested in defending their votes, and throwing upon them the onus of putting forward some defence, and as none such was put forward, the judge would be justified in striking off a sufficient number of such votes to reduce the majority of the respondent Parry to a minority.

With respect to the other question raised, viz. as to the construction of the 25th section, I think it right to state my opinion. I believe we are not absolutely unanimous as to this point, but in my view the true construction is against the petitioner's contention. It must be remembered that we are dealing with a state of the law which makes bribery complete so far as the bribe is concerned without acceptance of the bribe by the voter, and that a corrupt receipt of the bribe is a separate and independent offence. The words of the section are as follows. [His Lordship here read the section.] In my opinion the expression "so bribed" on which reliance was placed, means bribed by the candidate "himself or some person on his behalf," and it is necessary to prove before the vote can be struck off not only the giving of the bribe with a corrupt motive, but evidence must be given that there has been a corrupt proceeding by the person who received the bribe. It is argued that this will greatly diminish the protection against corruption intended by the statute. I do not however think this is so. All that will be necessary is that the act of bribery on the part of the person bribing should be proved, and some evidence given that the person receiving the bribe received it under circumstances which raise a fair inference of corruption on his part. On that, if no contrary evidence be given, without further inquiry and without looking into the question for whom the voter bribed did vote, even it may be when he has in fact voted on the side in whose favour he was not bribed, one vote is struck off. The effect therefore is still very powerful and may be most detrimental to the person bribing. It seems to me that this construction fully preserves the intention of the Act and is most consistent with the state of the law at the time that it was passed.

BRETT, J. It seems to me necessary, in order to decide both the points that have been raised, to consider the true construction of the 25th section of the Ballot Act. To determine what it is necessary to prove under that section, and the mode of proof, it is desirable to consider what the law was before the Act passed. Before 17 & 18 Vict. c. 102, and afterwards with reference to the cases to which it applied, in cases of petitions where the seat was claimed, the first question to be considered was, whether the sitting member was to be unseated for the bribery alleged, and if he was, it was necessary to have a scrutiny in order to seat the petitioner. Before 17 & 18 Vict. c. 102, in the case of a voter bribed whose vote was to be struck off on such scrutiny, it was necessary to prove an agreement between the person bribing and the person bribed, and then to inquire on which side the latter had voted. His name was then struck off from the poll of the candidate for whom he had voted. After 17 & 18 Vict. c. 102, it was no longer necessary to prove an agreement between the party bribing and the voter, and either of them might be found guilty of bribery without any such agreement. The person bribing by the statute was to be guilty if he gave or agreed to give anything with the intention of influencing the vote, independently of the question whether the vote was in fact influenced; but the fact of the giving alone not only did not conclusively shew that the voter was bribed, but, I should have thought was no evidence of it against him at all. It was necessary further to inquire whether the voter on his side was bribed, and if the conclusion was arrived at that he was, it was then necessary to inquire also which way he voted, in order to see which poll he was to be struck off. So that, both before and after 17 & 18 Vict. c. 102, it was necessary to go into the inquiry how each person had, in fact, voted. There were, therefore, at the time of the passing of the Ballot Act, three necessary points of inquiry, viz. first, whether the candidate had been guilty of bribery; secondly, whether the voter was bribed; and, thirdly, which way he had voted. When the Ballot Act was introduced, the intended effect of the Act would have been greatly contravened if the third inquiry had remained necessary. It was desired to obviate this difficulty and preserve the secresy, which was the essential object of the Act, and therefore the 25th section was passed; and its meaning seems to me obvious when we look at the state of the law previously. The occasion to which the section refers is that to which I have referred, viz. when there is a trial on a petition claiming the seat; then, if bribing is proved against the candidate, and his seat is thereby lost, there is still to be a scrutiny in order to see whether the petitioning candidate can be seated, which seems to me to indicate that the case of each voter is to be examined into, and "on such scrutiny there shall be struck off from the number of votes appearing to have been given to such candidate, one vote for every person who voted at such election, and is proved to have been so bribed, &c." I agree with my Lord, that the phrase "so bribed" only refers to the words, "by himself, or by any person on his behalf;" but unless you strike out the whole of the second phrase of the latter part of the section, it is impossible to stop at the inquiry into what the candidate has done, and not inquire further whether the voter has been bribed. The truth is, that the section leaves the nature of the scrutiny just as it was before, except that the judge cannot inquire into the question how the voter voted, for this would be contrary to the spirit of the Act.

That is the only change, and the necessary result is, that as you cannot inquire which way the voter voted, so as to see from whose poll the vote is to be struck off, some other and more stringent method of dealing with the case must be adopted; and accordingly one vote, though of course not necessarily the bribed vote, is to be struck off from the poll of the person bribing. The effect is much greater than under the old law in many cases. For, to take the illustration suggested in argument, if under the old law the candidate bribed fifty voters, and twenty-five voted for him and twenty-five for his opponents, and such votes were struck off on both sides, he was not hurt, but now the fifty would be struck off from his poll, and his opponents would retain the twenty-five that were in their favour. Then, what effect has this section on the mode of proof? One of the most effective pieces of evidence formerly to prove that a voter had been bribed, if it could be procured, was, that after receiving a gratuity, the recipient voted contrary to his previous promise or known political opinions. Such evidence often could not be procured in cases of bribed voters, because some voters were bribed to vote in accordance with their opinions, it being often the case that a man, though he would not vote against his party, would not vote for it unless bribed; but in many cases such evidence was forthcoming, and was most effective. If the secresy which it was the object of the Act to secure was to be preserved, it is obvious that this source of evidence must be given up; but it does not seem to me to follow that the Act has made any difference in this, that it is necessary to establish by evidence that the voter has been bribed. The judge must be satisfied by the evidence that a sufficient number have been bribed by the candidate to reduce his majority to a minority. Then, was there sufficient evidence here? I cannot say I am of the same clear opinion as my Lord on this point. In acquiescing with his opinion, and that which I understand to be my Brother Groves' opinion, the utmost I can say is that I am not prepared to differ. It seems to me that the evidence, if any, is of the slightest kind, and I have the greater difficulty in deciding, because the point is brought before me in such a manner that I cannot exactly say what the evidence was with regard to the different voters. The question, as I understand it, is whether there was evidence against the voters that they were bribed, on the assumption that it was necessary to prove that they had been bribed. This is reserved as a question of law, and it amounts to this: whether there was such evidence, as, if this case were to be tried by a jury, would be evidence that the judge would be justified in leaving to them. Such a question being raised as a point of law, it seems to me to be identical, whether the case is of a civil or criminal nature: the laws of evidence are the same in either case. In a civil case, though the defendant can be called, it seems to me, in deciding whether there is evidence to go to the jury, you have no right, except in a particular case I will afterwards refer to, to ground yourself on the fact that the defendant might have gone into the box but declined to do so; for you have no right to call on him to do so unless there is previously a primâ facie case. The exception is in the case of some matter which is exclusively or peculiarly in the knowledge of the defendant, and as to which he alone could easily give an explanation, but does not give it. In such a case you have a right to take into account that he has offered no explanation. What, then, is the evidence in the present case that is alleged to be such evidence as ought to be left to a jury? It seems to me of a very different kind as affecting different voters. It is stated in the case that Mr. Parry before the dissolution was a candidate, and accepted by the Liberal party as such. It is not stated, nor does it appear, how many of the voters were likely to know it. The usual course would be to announce the fact at some public meeting of influential persons belonging to the party; but we are not told how that was, or that the candidate had issued an address, or whether his candidateship was proclaimed in any open manner. The evidence would be of very different weight as affecting persons who knew and persons who did not know of the candidateship. The candidate appears to have written a letter at the time of year when people may dispense small charities, and coals were subsequently distributed in the manner described in the case; certain persons went round and asked the voters and others whether they would receive a gift of coals. It is stated that some of those who were asked were small shopkeepers, who would not require such presents, and some 10*l.* householders. Now the

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evidence would be of very different weight in the cases of persons who were fit recipients of charity and those who were not. If persons in comparatively affluent circumstances were offered coals it would naturally put them on inquiry as to the reason of such offer. Then, with respect to the card that was given, to a person who knew Mr. Parry to be a candidate the effect would be very different from what it would be to a person who did not know. It must be remembered Mr. Parry had given charitable gifts before, and if no address had been issued the gift might have no peculiar significance to the recipient. Then, again, in the case of those who knew Mr. Parry to be a candidate, the case would be much stronger against those who knew that Dyer was his political agent than against those who did not. Beyond the facts that I have mentioned there was no further proof that the donees received the coals corruptly, or knew that they were corruptly given. With respect to persons who were voters, I do not lay much stress on the probability that they did not know that Parry was a candidate, though I do not think it ought to be entirely disregarded; but with respect to those voters who from their position might fairly be considered as the fit recipients of a charitable gift, and who did not know that Dyer was the political agent of Parry, or that the persons who came to ask them if they would receive coals were canvassers for him, though I refrain from saying there was no evidence, I think it was of the slightest kind. It seems to me that this would appear to be so more clearly if such a question arose in an ordinary criminal trial, and if this was not the case of a political contest in which what one knows about the motives of the briber is apt to colour one's view of the conduct of the voter. It appears to me most difficult to determine this question without having been present at the trial and knowing what happened there, and how much the counsel for the voters intended to admit. I am not prepared to say that there was not some evidence even against all the voters, but in my opinion it was for the learned judge who heard the case to say on such evidence whether he thought that such voters were bribed, and that it ought to be for him, and not for the Court, even now to decide on the evidence.

GROVE, J. It will be most convenient, before proceeding to give my opinion on the points raised, that I should state shortly how the matter arises. At the conclusion of the case of bribery against Mr. Parry, which resulted in his being unseated, a scrutiny to ascertain whether Mr. Malcolm was to be seated was about to take place. Mr. Giffard called my attention to s. 25 of the Ballot Act, and claimed on the construction of that section to strike off from the votes for Mr. Parry one vote for each person who had received the donation of coals, which I had decided was corruptly given by Mr. Parry's agent. Nobody had then appeared who was interested in opposing Mr. Giffard's contention. Mr. Parry had no interest in the matter. I suggested, however, that the section was not altogether so clear as was assumed, and that the words "so bribed, &c.," might import the necessity of corruption on the part of the receiver. The matter was then adjourned, it being the close of the day, and the next morning Mr. Chandos Leigh stated that he was instructed on behalf of a considerable number of voters—I do not remember the exact number, but I have no doubt he is right when he says that he stated the number to be 112—and that he was prepared to call them to shew that they were not influenced by corrupt motives. A great deal of discussion then took place between the counsel. There was, no doubt, considerable difficulty and practical inconvenience in the case on both sides; the counsel would have had to go into a scrutiny of the individual motives of a very large number of people to see whether they had corruptly received these gifts. It was not likely, on the one hand, that they would admit corruption, and their evidence so far might have been detrimental to Mr. Giffard's case; but, on the other hand, they would have been exposed to cross-examination, and it was not impossible that facts might be elicited by Mr. Giffard which would supplement the primâ facie case, which I might not have thought sufficient, and make it conclusive. Eight hundred and seventy-seven persons had received coals through the cards referred to, and all that Mr. Giffard proposed to prove was that such persons had voted. Mr. Leigh himself suggested that the Court might think that that evidence threw the onus on him of rebutting it, so that this question was clearly contemplated.

In the end it was most explicitly arranged by the counsel that they would let the case rest where it was, and on the facts as then proved would raise the point whether enough had been shewn to establish a primâ facie case for the disqualification of the voters, and to throw the onus of answering it on them. It is clear that the case was settled on that footing, for otherwise a great deal of the matter set out would have been unnecessary. It is, therefore, clear to my mind that the questions to be raised were, first, on the construction of the 25th section, and, secondly, whether a primâ facie case had been established. I entirely agree with my Lord's view on the latter point. With respect to the point raised as to the construction of the 25th section of the Ballot Act, I entertain considerable doubt, though I do not differ from the opinion of the rest of the Court, nor do I wish it to be considered that my mind leans to a contrary opinion. Mr. Giffard rather based his argument on the definitions of bribery, treating, and undue influence in the Corrupt Practices Act of 1854. If the use of those expressions in the 25th section of the Ballot Act were to be referred exclusively to those definitions, I should agree with the rest of the Court; but it appears to me that an argument might have been put forward derived from the Ballot Act itself, and not based on the footing that that Act exclusively refers to the definitions of the former Act. There is another point which arises. By the 41st rule of the Ballot Act, 1872, 1st schedule, the mode in which an elector voted is not to be disclosed until the vote is declared to be invalid, that is, until he has been shewn to have had no right to vote, and the object is clear, viz. to enable the election judge on a scrutiny to strike off the invalid vote from the poll of the party who has received it. The vote is not to be struck off hap-hazard, but from the party receiving it. If the 25th section means that no vote should be struck off till it has been proved that the voter was bribed, in the sense that the vote was corruptly influenced, and so the vote was invalid by reason of corrupt practices;—if that be the true construction, why should not the vote be struck off under the 41st rule, and why should a different provision be made to meet precisely the same circumstances? If, under the 41st rule, you are to look to the vote to see which side the vote is to be struck off from, why, under precisely similar circumstances under another section, is the vote to be struck off without ascertaining for whom it was given?

I cannot say I am without doubt on the construction of the section, and I pronounce no opinion upon it, but reserve to myself entire freedom of opinion if the point arises on a future occasion. On the second point I am quite clear: I think it fairly arises on the case as stated, and was raised by the discussion before me at the trial. The question is, whether on the evidence given by Mr. Giffard there was evidence on which, unanswered, a jury might have acted if the question was for them. I think there was. I must, however, decline to undertake the onus which my Brother Brett would cast upon me, viz. of looking into the facts relating to each voter out of the 887. In my opinion the point was reserved on this footing, that if a primâ facie case was made out requiring an answer Mr. Giffard's contention was to be established and the petitioner seated. To my mind there was evidence requiring an answer, and if so, no answer having been given, by the terms on which the point was reserved, the Court is to give judgment for the petitioner. If this were an ordinary case of a money bribe there would, I cannot help thinking, be no doubt about this question. The difficulties now suggested would not only have never been raised, but never even would have occurred to any one's mind. Suppose, instead of coals at the time when the voter was canvassed, a 5*l.* note had been given, could it be said, on proof that the candidate's agent had corruptly made a pecuniary donation, that there would not be a primâ facie case against the voter of receiving it corruptly? No doubt, bribery may be in some cases a question of degree: it frequently, of course, is not done in an open way, but takes a more indirect and doubtful form, as, for instance, a payment of 5*l.* a week for lodgings worth 3*l.*; but if a man receives what the judge thinks a corrupt pecuniary gift, surely the onus is on him of exculpating himself, and of shewing that he received it innocently. I do not think there would be much difficulty in such a case. The present case is somewhat different. Coals are given about Christmas time when a dissolution, though not immediately expected, was known to be likely to take place soon, and the donation is obviously not really charitable, being made to persons who were voters, and not in any sense fit objects of charity. The question is, whether such facts as these do not amount to primâ facie evidence. My Brother Brett said that there was no proof that all the voters knew that Mr. Parry was a candidate. No doubt the case does not find it, but we cannot reduce human affairs to mathematical certainty, or prove a case beyond the possibility of doubt. I think it may be reasonably presumed that a very large number of them knew. Many of them knew that certain persons had canvassed for him, and had given the coals about the same time.

I think altogether that the facts primâ facie raise an inference that the gift was corruptly received.

Mr. Leigh, I think, under the circumstances, exercised a very wise discretion, and did a very reasonable thing on behalf of those whom he represented. There would have been considerable risk about calling the voters, and he elected, and not unwisely, though the event has proved against him, to abide by the case as it then stood. I cannot say that at the trial the full bearing of the questions raised, and of all the arguments on the subject, were present to my mind, but at nisi prius it frequently happens in the same manner, that the point though raised is not fully developed at the trial. The case is not free from difficulty, but on the whole I clearly agree with my Lord on the second point.

Judgment for the petitioner.

Attorneys for petitioner: *Collyer-Bristowe & Co.*
Attorneys for voters: *Paterson, Snow, & Burney.*

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10 CP 714

IN RE LAUNCESTON ELECTION PETITION.

DRINKWATER, PETITIONER; DEAKIN, RESPONDENT.

Parliament—Election Petition—Disqualification, Notice of—Votes thrown away.

There being two candidates at a parliamentary election, one of them was guilty of a corrupt practice by giving leave, on the day of nomination, to his tenants to kill rabbits on his estate, for the purpose of influencing their votes at the election. A notice was given to the electors on the morning of the polling-day, before the polling, by the agent of the other candidate, in the following terms: "Colonel D. having, for the purpose of influencing voters at this election, given to all his tenants on the Warrington estate and voters in this borough a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice, and, as agent of H. C. D., Esq., a candidate at this election, I hereby give you notice that, under these circumstances, the said Colonel D. is disqualified from being a candidate, and that all votes given for him will be thrown away." Colonel D. obtained the majority, and was declared elected, but, being petitioned against, was unseated, on the ground of the above-mentioned corrupt practice. The petitioner claimed the seat on the ground that the votes given to the respondent being given with knowledge of his disqualification, were thrown away, and consequently the petitioner was in a majority:—

Held, that bribing by a candidate at an election, though it renders his election void if he be found guilty of it on petition, does not incapacitate the candidate at that election in the sense that the votes given for him by voters with knowledge of it will be thrown away, and that no disqualification arises in that sense of the term until after the candidate has been found guilty of bribery on petition, and consequently, that the petitioner was not entitled to the seat.

CASE stated by Mellor, J., for the opinion of the Court of Common Pleas under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 12, of which the facts were as follows:—

James Henry Deakin and Herbert Charles Drinkwater were duly nominated as candidates for the borough of Launceston on the 30th day of January, 1874. The polling took place on the 2nd day of February, 1874. The returning officer declared the result of the poll to be for Deakin, 457, and for Drinkwater, 216.

A petition against the return of Deakin was duly presented by Drinkwater, who claimed the seat, and the petition was heard before Mellor, J.

Upon the evidence at the trial the judge came to the conclusion that the respondent, Deakin, had by himself been guilty of a corrupt practice within 17 & 18 Vict. c. 102, s. 2, because he had, at a meeting of the electors on the day of nomination, and on the day after the nomination, consisting of tenants of the respondent and other electors, for the purpose of influencing voters and inducing voters to vote at the election, given to certain voters in the borough at the said election, being tenants of the respondent, a right to trap and shoot rabbits and appropriate them to their own use, being the corrupt practice alleged in the petition, and the judge found that the respondent was not duly elected and returned. It was proved before the judge that, subsequent to the commission of the offence above referred to, viz., on the day of the poll, a printed notice was issued in the following words:—

"To the electors of the borough of Launceston. Colonel Deakin, having, for the purpose of influencing voters at this election, given to all his tenants on the Warrington estate and voters in this borough a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice; and, as agent of Herbert Charles Drinkwater, Esq., a candidate at this election, I hereby give you, and each of you, notice that, under these circumstances, the said Colonel Deakin is disqualified from being a candidate, and that all votes given for him will be thrown away.

"I am, yours obediently,
"John Gurney."

The judge found as a fact that such notice was issued on the morning of the polling day before the opening of the poll, and was brought to the notice of the voters of the borough before they voted. It was contended, on behalf of the petitioner, that the status of the respondent as a qualified candidate being destroyed by the corrupt practice so found to have been committed as aforesaid and the voters having such notice, the petitioner was the only candidate before the constituency eligible to receive their votes and to be declared elected, and the judge was asked to declare him so elected, in accordance with the prayer of the petition.

It was contended on behalf of the respondent that, under the circumstances above stated, the petitioner was not entitled to the seat, because the votes given by the voters for the respondent were not given for a candidate whom they then knew, or were bound to know, was disqualified, and that no disqualification attached to the respondent at the time of the nomination or poll,

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nor until he should have been found by an election judge guilty of a corrupt practice; also that the notice was invalid, as it contained no positive statement of a disqualification, and even if valid that it was given too late. The judge referred to the court the following questions:—

1. Was the notice a valid notice?

2. Were the votes of the voters who received the said notice on the day of the poll before voting, and who voted for the respondent, thrown away as votes given for a candidate they were bound to know was disqualified?

3. Was the petitioner, there being no disqualification on his part, entitled to be declared elected for the said borough?

Manisty, Q.C. (with him *Leresche* and *Batten*), for the petitioner. The rule of law to be deduced from the authorities is, that if notice that a candidate is disqualified is given with sufficient distinctness to the voters before voting, they vote for such candidate at their peril; and if in point of fact the candidate turns out to be disqualified, their votes are thrown away and the opponent is entitled to the seat. The notice in this case is sufficiently distinct. The addition of the words "I believe" does not vitiate it, for they would be implied in all cases. A person making a bonâ fide statement necessarily believes it. In the *Belfast Case* (1), the notice was to the effect that the parties signing it "were advised" that a disqualification existed. The authorities on the subject of votes being thrown away are collected in Rogers on Elections, 7th ed. p. xiii. of the appendix to the first part. When the disability of the candidate is notorious it is not necessary to give notice to the electors; and if the analogy of elections of corporate officers is to be followed, it is never necessary to do more than give notice without producing any evidence of the fact, though the electors may not have the power of satisfying themselves whether the objection is well founded or not. See *Rex* v. *Blissel* (2); *Taylor* v. *Mayor of Bath* (3); *Fife Case* (4); *Kirkcudbright Case* (5); *Wakefield Case* (6); *Cheltenham Case* (7); *Tavistock Case.* (8) In many of those cases the fact alleged as a disqualification was one of the truth of which the electors could not judge, as, for instance, in the *Tavistock Case*, whether there was a qualification by estate, the candidate publicly declaring that he had such qualification, his opponents having given notice that he had not. Yet the minority candidate was seated. See also the *Horsham Case* (1); the *Clitheroe Case.* (2)

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(1) Falc. & Fitz. Election Cases, 595.

(2) Heyw. County Elections, 537.

(3) 3 Luders, 324.

(4) 1 Luders, 455.

(5) 1 Luders, 72.

(6) Bar. & Aust. 306.

(7) 1 P. R. & D. 234.

(8) 2 P. R. & D. 5.

[LORD COLERIDGE, C.J. In the *Clitheroe Case* (2), the committee made a special report on this subject, pointing out the unsatisfactory state of the law and the conflicting nature of the authorities. They elected to follow the cases which point to the conclusion that to give effect to the notice, the disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person. I believe that view has ever since been followed, as, for instance, in the *Cambridge Case.* (3)]

The common law authorities all shew that after notice of disqualification the electors vote at their peril; if the person for whom they vote is in fact disqualified, it is the same as if they had not voted at all. As it is put by some of the judges, it is as if they voted for a "dead man" or the "man in the moon": *Rex* v. *Hawkins* (4); *Reg.* v. *Coates* (5); *Rex* v. *Parry* (6); *Claridge* v. *Evelyn* (7); *Reg.* v. *Mayor of Tewkesbury.* (8)

[LORD COLERIDGE, C.J. Voting for a "dead man," or for a man obviously and notoriously disqualified, is a very different thing from voting for a man who proves to be disqualified, after much doubt and argument upon the effect of complicated facts or legal inferences.]

The disqualification here does not arise from the effect of complicated and uncertain enactments; it is the ordinary case of bribery. How in such a case can more be done to give notice to the voters than was done here?

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(1) 1 P. R. & D. 240.

(2) 2 P. R. & D. 276.

(3) Reported in Rogers on Elections, p. 225, but not on this point.

(4) 10 East, 211; 2 Dow's Appeal Cases, 124.

(5) 3 E. & B. 249; 23 L. J. (Q.B.) 133.

(6) 14 East, 549.

(7) 5 B. & A. 81.

(8) Law Rep. 3 Q. B. 629.

[He also cited the Galway case, *Trench* v. *Nolan.* (1)]

Sir J. Karslake, Q.C. (with him *Parry, Serjt.*, and *Edwards*), for the respondent. First, as to the question whether the notice in the present case was sufficient to cause all votes given for the respondent to be thrown away. There are, no doubt, cases in which the disqualification consists of some definite isolated fact, which is generally notorious, or which is so brought to the knowledge of the voters that they cannot fail to have knowledge of it, and in such cases where they wilfully persist in voting for the disqualified person it is as though they did not vote at all: *Rex* v. *Bridge.* (2) The common law cases that have been cited are mostly of this character, e.g. those where the candidate was not of age, or had not taken the sacrament in the case of municipal elections. The conduct of the voter must amount to perversity in order that the vote may be thrown away. With respect to the decisions of the parliamentary committees, they are not absolutely binding on this Court, though entitled to respect as responsa prudentum. Moreover they are inconsistent with one another, and the rule given by the later cases, viz. the *Clitheroe Case* (3), and the *Cambridge Case* is to be followed. When the disqualification depends upon the legal inference to be drawn from complicated facts and questions of intention, it cannot be that a mere notice by the opponent can bring the disqualification to the knowledge of the voters so as to constitute perversity in voting for the disqualified person, and cause the votes to be thrown away.

It is submitted that the true rule may be this, though there are dicta to be found in the contrary direction, viz. that persons who give their votes to a disqualified candidate, knowing him to be disqualified, throw them away. Whether they have such knowledge from the notoriety of the thing, or from the notice given them, will be a question to be determined by the judge who has to try the particular case. If the candidate is primâ facie a sufficiently qualified candidate, the voter is entitled to vote for him unless he knows him to be actually disqualified: *Gosling* v. *Veley.* (4) The notice in the present case was certainly not sufficient. The party giving it expressly abstains from stating absolutely that the candidate is disqualified. He merely states that he believes a corrupt practice to have been committed. It may be a nice question of law and fact whether what has been done, if anything, to justify such belief amounts to a corrupt practice. It cannot be reasonable that a voter on a doubtful question of law should be considered to act perversely in voting for the candidate of his choice.

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(1) Ir. L. Rep. 6 C. L. 464.

(2) 1 M. & S. 76.

(3) 2 P. R. & D. 276.

(4) 7 Q. B. 406; 12 Q. B. 328; 4 H. L. 679. 7 Jur 939

Secondly, it is contended that there was not a disqualification in the present case in the sense that votes given with the knowledge of it were thrown away. On the proof of the corrupt practice the election may be set aside, but the disqualification only arises upon the finding of a competent tribunal. Disqualification by something occurring during the election is not sufficient. There must have been for this purpose an absence ab initio of the status that entitled the candidate to become such. The judgment in the Galway case, *Trench* v. *Nolan* (1), decides the contrary of this contention, but it is submitted that the reasoning of that decision is unsatisfactory, and Lawson, J., clearly appears in his judgment to have misapprehended the meaning of some observations of Martin, B., in his judgments in the *Beverley Case* (2) and the *Norwich Case.* (3) The latter learned judge distinctly guards himself from being supposed to mean that votes in such a case as this would be thrown away. The 17 & 18 Vict. c. 102, s. 1, repeals all former Acts as to bribery and treating. The 2nd section enacts that persons doing certain things in the nature of bribery and corruption shall be guilty of a misdemeanour. This section is not confined to candidates. The 36th section enacts that a person declared guilty of such a misdemeanour shall be disqualified to be elected to Parliament for such county, city, or borough during the Parliament in existence. It is not till a person is found guilty that he is fixed with the status of incapacity. If it had been intended that there should be a relation back of the disqualification to the act of bribery it would have been easy to say so in express terms. The finding of the judge is no evidence of corrupt practices as against the voters, who are no parties to

(1) Ir. L. Rep. 6 C. L. 464.

(2) Wolf. & D. 221.

(3) Wolf. & Br. 144; 19 L. T. (N.S.) 615.

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the petition, so as to cause their votes to be thrown away. They have no opportunity of shewing that the candidate was not disqualified. [He also cited the Parliamentary Elections Act, 31 & 32 Vict. c. 125, ss. 25, 26, 43.]

Manisty, Q.C., in reply.

Cur. adv. vult.

June 22. The following judgments were delivered by

LORD COLERIDGE, C.J. This is a case arising out of the Launceston election petition tried before my Brother Mellor at Launceston, and referred to us by him.

Colonel Deakin, the respondent, was returned as member for the borough at the last general election; and Mr. Drinkwater, the petitioner, was the defeated candidate. He petitioned against Colonel Deakin's return, and claimed the seat. My Brother Mellor, on the trial of the petition before him, found that Colonel Deakin had been guilty of what he terms a "corrupt practice," because, in the words of the learned judge himself, "he had at a meeting of the electors on the day of nomination, and on the day after the nomination, consisting of his tenants and other electors, for the purpose of influencing voters and inducing voters to vote at the election, given to certain voters in the said borough at the said election, being his tenants, a right to trap and shoot rabbits and appropriate them to their own use."

It was proved that, subsequently to the commission of the offence, viz. on the day of the poll, a printed notice was issued in the following words:—

"To the Electors of the Borough of Launceston.

"Colonel Deakin having, for the purpose of influencing votes at this election, given to all his tenants on the Warrington estate and voters in this borough, a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice; and, as agent of Herbert Charles Drinkwater, Esq., a candidate at this election, I hereby give you and each of you notice that, under these circumstances, the said Colonel Deakin is disqualified from being a candidate, and that all votes given for him will be thrown away.

(Signed) "John Gurney."

The learned judge found as a fact that this notice was issued on the polling day before the opening of the poll, and was brought to the notice of the voters of the borough before they voted. He found also that Colonel Deakin was not duly elected and returned; and three questions have been left to this Court by my Brother Mellor.

The real matter we have to determine is, whether the petitioner, Mr. Drinkwater, is or is not entitled to be declared elected for the borough of Launceston. Three propositions have to be made out in order to arrive at this conclusion,—1. That Colonel Deakin was at the time of the election in point of law disqualified; 2. That, notice of that fact having been conveyed to the voters in a form sufficiently definite, any vote given after such notice was in law thrown away. The peculiar circumstances of this case made it necessary to contend farther, that,—3. The uncertainty or obscurity of the legal question on which the disqualification depends makes no difference:—Given the fact of legal disqualification, as the result of argument however elaborate and decisions however conflicting, and given the fact of notice, the voter gives his vote at his own risk and on his own responsibility.

The law as to the disqualification of the candidate, and the notice of such disqualification to the voter, is to be collected from the decisions of Courts of law and of parliamentary election committees, which latter, if not binding upon this Court, by the 26th section of 31 & 32 Vict. c. 125 are yet to be treated with respect as expositions of the law of parliament, which is part of the common law itself. And, if there be any difference discoverable in the authorities between the rules applied to parliamentary elections and the rules applied to elections of other sorts, there seem to be reasons of good sense why a somewhat less rigid and technical rule as to the throwing away of votes should obtain in the case of parliamentary constituencies. It may not, however, in the present case be necessary to decide this point, because it has first to be established that the candidate was at the time of the election in point of law disqualified; and, if this cannot be made out, any farther inquiry becomes useless.

Was Colonel Deakin, then, disqualified in point of law at the time of the election? That depends upon the meaning of the word "disqualified;" and in this case, as so often happens with

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regard to the English language, much argument would be prevented by accurately defining the terms to be employed, and always using them in the sense defined. The word "disqualified" may be used in two senses at least,—either to signify a person disqualified to be elected, so that, although the great majority of the electors voted for him, his election would be void; or to signify a person disqualified to be a candidate, so that, upon notice of the disqualification, if the great majority of the electors voted for him, his election would be void, with this farther consequence, as regards the electors, that they would be held to have intentionally and deliberately abstained from voting, and to have acquiesced in the choice by the other electors of the other candidate, because they would not do what alone could prevent such choice,—vote themselves for a candidate duly qualified to be one. It is in this latter sense that we must hold Colonel Deakin to be disqualified, before we can decide that Mr. Drinkwater is, as the result of this election, entitled to be returned to the House of Commons as member for Launceston.

The facts are simple. Colonel Deakin is found by the judge to have been guilty of bribery before the polling day. And it is contended that, from the moment of the commission of the act afterwards found by the judge to be bribery, he was ipso facto and eo instanti disqualified, in the latter of the two senses I have explained of that word. There is, indeed, no doubt that there are certain disqualifications which if they had existed in the case of Colonel Deakin would, upon notice of them, have had the effect contended for. In many cases in the Courts at Westminster, and in several in the election committees, the decisions have undoubtedly gone this length. *Rex* v. *Hawkins* (1) was such a case, where votes given for a man incapable of being elected into a corporate office under the provisions of 13 Car. 2, c. 12, by reason of his not having taken the Sacrament, were held to be, after notice of such incapacity, as if not given; and Lord Ellenborough assented to the general proposition that "votes given for a candidate after notice of his being ineligible are to be considered the same as if the persons had not voted at all." But this was upon the ground that the status of a candidate was taken away by the operation of the

(1) 10 East, 211.

statute of Charles II.; for, in the later case of *Rex* v. *Parry* (1), Lord Ellenborough and the other judges held a man to be duly elected who had been at the time of the election disqualified for exactly the same reason as in the former case, because before his election could be questioned he had become qualified, which he was not when elected, and his subsequent qualification by retrospectively restoring his status called into existence the votes which would otherwise have been treated as not given. These and other like cases were decided upon the Test Act, where a condition made by law a condition precedent to candidature had not been fulfilled, and where notice of its non-fulfilment was notice that the man who had not fulfilled it was not and could not be a candidate.

Under the same principle may be classed cases where the disqualification was infancy, such as was *Claridge* v. *Evelyn* (2), a want of estate, as in the *Belfast Case* (3), the *Tavistock Case* (4), and some others. The cases of a woman, of an alien under the old law, of a convicted felon, stand upon the same footing. In all these cases something is wanting in the candidate himself which cannot be supplied, the existence or non-existence of which is not dependent on argument or decision, but which the law insists shall exist in every one who puts himself forward as a candidate.

Bribery, however, is altogether a different matter, and is subject to considerations altogether different. No doubt, as Lord Mansfield says in *Rex* v. *Pitt* (5), it was always a crime at common law punishable by indictment or information. That, however, would not by itself prevent a person who had bribed from being a candidate at an election; and there is no case in which any such consequence has been held to flow from the commission of the offence, except under circumstances which when rightly considered and properly understood, establish, and do not vary or qualify, the rule. The offence of bribery has, however, been dealt with in various statutes, and the argument to be drawn from their language appears to me, I own, to be conclusive the other way.

The 17 & 18 Vict., c. 102 consolidated and amended the laws relating to bribery, treating, and undue influence at elections of

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(1) 14 East, 549.

(2) 5 B. & A. 81.

(3) Falc. & Fitz. 595.

(4) 2 P. R. & D. 5.

(5) 3 Burr. 1335, 1338.

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members of parliament. It begins by repealing in whole or in part many of the old statutes relating to these subjects; nor is it necessary for the present purpose to consider the provisions of those which remain in force. It enacts in the 2nd section, in words sufficient to cover the case of Colonel Deakin, that persons who do certain acts shall be deemed guilty of bribery, and punishable accordingly. It then proceeds in the 36th section as follows, in words which are of the utmost importance,—"If any candidate at an election for any county, city, or borough shall be *declared by any election committee guilty*, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in parliament for such county, city, or borough, during the parliament then in existence." The words, it will be observed, are not "shall be guilty," but "shall be *declared* guilty by an election committee;" and it seems clear that, but for these words, a man guilty and declared guilty might have sat even during a current parliament for the very seat which he had lost by bribery, except at the particular election rendered necessary by that avoidance, which is regarded as an adjournment only or continuance of the election so avoided.

The Act of 26 & 27 Vict. c. 29 does not contain any provisions which with reference to this particular subject it is necessary to consider. The 31 & 32 Vict. c. 125, by which the jurisdiction of the House of Commons in matters of election petitions was transferred to the judges of Westminster Hall and to this Court, contains very important provisions, especially ss. 43, 45, 46, and 47. These clauses deal with the punishments to be inflicted upon candidates and other persons in respect of bribery and other corrupt practices; these punishments being greatly more severe in the case of bribery than in those of other corrupt practices. It seems to me to result from them all that the disqualifications created by them are intended to be and are the result of the finding or report of the judge or other tribunal, and that they attach only on such finding or report, and from its date. In the case of the candidate, his "incapacity of being elected to and of sitting in the House of Commons during seven years," is expressly to begin "*after the date of his being* PROVED *guilty*." The other severe provisions of the 43rd section are limited in like manner. Precisely the same words are to be found in the 45th section, which deals with the case of bribery in persons other than the candidate himself. The 46th section re-enacts the 36th section of 17 & 18 Vict. c. 102, substituting the words "reported by a judge on the trial of an election petition" for the words "declared by an election committee," on which I have already commented. The 47th section provides for the removal of the disqualifications created by the former sections, in cases where they are proved to have been procured by perjury; and this section also declares, in effect, that such disqualifications did not exist till they had been so procured, that is, after trial and as the result of it.

The conclusion, therefore, is, that neither apart from the statutes nor created by the statutes is there in a candidate from the moment of his bribing and after notice of the fact of his bribing any such disqualification as to prevent him thereupon from being a candidate at the then election, and to make all votes given in his favour after such notice as if they had not been given at all. Invalid, upon proof of his bribery, for the purpose of seating him, they are; thrown away, for the purpose of seating his opponent, in my opinion they are not.

I have already explained, and will not repeat, why, entirely accepting and being bound by the authority of such cases as *Rex* v. *Hawkins* (1), they seem to me to be altogether inapplicable to the present case. Cases, however, were cited to us, decided by election committees, which it was contended had established the propositions contended for by Mr. Drinkwater's counsel. Most of them, however, are clearly distinguishable; and I think that there is not one which, accurately considered, is inconsistent with the conclusion at which I have arrived. I am now speaking of those cases only which have been decided by election committees on questions of bribery. In every case which I have been able to refer to the bribery relied upon as creating a disqualification is bribery committed by the candidate at the election which was avoided; and it has been held, no doubt, that such bribery is a disqualification for a candidate at the election rendered necessary by such avoidance. It could not be held otherwise; for, the second election under these circumstances is but a continuation of the first, the exigency of the writ not being satisfied till there is a *good* return, and by supposition the return of the candidate found guilty of bribery is not a good return, and there must therefore be a return of some one else. The cases in which a man guilty of bribery in fact at an election declared void has been held disqualified in a second election, though his bribery had not been inquired into on the first petition, fall under the same principle. On this point the decisions have been uniform, though as to the consequences to the voters of such disqualification the decisions seem to be conflicting.

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(1) 10 East, 211.

The principle of all the earlier cases will be found very well discussed in a note in 1 Luders, 69; and there is nothing in the later cases at all to qualify the law as there laid down.

There remains, however, one decision to be considered, to which these remarks do not apply, which I admit to be in point, but which I am unable to follow. It is the decision of the majority of the Court of Common Pleas in Ireland in the *Galway Case* (1), in 1872, which I take from the Report ordered by the House of Commons to be printed in July of that year. The case was peculiar. Captain Nolan, the candidate whose election was questioned, was found guilty by Mr. Justice Keogh of undue influence by himself and his agents, the undue influence having been practised as the result of arrangements made by the candidate and his agents previous to the election. The learned judge held that by this "the status of Captain Nolan as a candidate qualified to be elected was destroyed, and that he was disqualified to be elected for the county by such acts committed by him and his agents; and that such disqualification existed previous to the day of nomination for such election." On a case reserved for the Court of Common Pleas in Dublin, the majority of the Court upheld this decision; and Mr. Justice Lawson, who delivered the opinion of the majority, uses the following language upon this part of the case: "If," says he, "the earlier sections of 17 & 18 Vict. c. 102, ss. 2, 4, and 5, defining the offences of bribery, treating, and undue influence, and making them misdemeanors, do not disqualify the candidate who is guilty of them from being elected, and do not destroy his status, upon what ground is a judge to unseat him?

(1) Ir. L. Rep. 6 C. L. 464.

He cannot unseat a man because he has committed a misdemeanor, and it would seem, therefore, to follow in strictness from this argument that the judge could not unseat him unless he had already been found guilty." This might be so, no doubt, if avoiding the election of a candidate, and destroying the status of a man to be a candidate, were the same thing. But I have already pointed out that they are very different things, that the common law of Parliament and the language of statutes have always treated them as very different; and being, which they are, very different, it is only by treating them as being, which they are not, the same, that any such consequence follows as Mr. Justice Lawson supposes. He proceeds to say:—"This is, however an absurd consequence; and I think that the true construction of the statute is, that the commission of any of these offences ipso facto disqualifies the candidate from being elected, or, to use the language of Mr. Baron Martin, in the *Norwich Case* (1), 'annihilates his status as a candidate.'"

I have already expressed the sense in which I conceive the statute is to be construed; and I am very glad to find that I do not conflict with any view of Baron Martin. It is probable that Mr. Justice Lawson was quoting from some unauthentic and imperfect report of Baron Martin's words; for, in the full report of his Norwich judgment printed by order of the House of Commons, he is careful to disavow in express and accurate language the sense which Mr. Justice Lawson has affixed to his words. He explains that he uses them only in a sense in which I entirely agree with them, and gladly adopt them as my own. His words are these:—"But, by the 46th section, coupled with the 36th section of another Act of Parliament (17 & 18 Vict. c. 102), another offence is created. These two sections enact that, in the event of a candidate, by an agent, committing bribery, he becomes incapable of being elected; and where a candidate, by an agent for whom he is responsible, commits an act of bribery, by that act the capacity of the candidate to be elected ceases; his status is destroyed, and no vote given to him will be of any avail. Some misapprehension occurred with regard to what I stated the other day in reference to that matter. *It is not that the vote is thrown*

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(1) 19 L. T. (N.S.) at p. 619.

away in the sense in which my Brother Ballantine seems to have supposed. I did not mean it in that sense; I meant that, the moment an act of bribery is done by the agent for whom the candidate is responsible, from that moment *the man is incapable of being elected.* The law puts its hand upon him, and says it cares not if nine-tenths of the electors voted for him; the act of bribery incapacitates *him* from sitting in Parliament: and the real question which is to be decided in this case is, whether or not the admitted bribery by Hardiment (the agent) about two or three o'clock in the afternoon is an act for which Sir Henry Stracey is responsible according to the law of England, or the election law, if you think fit to call it so." I adopt these words entirely in the sense in which Baron Martin is careful to explain that he used them. I reject them in the sense in which Baron Martin himself expressly rejected them. If this be, as I think it is not, a refined distinction, it is one not of my inventing. It is to be found in every case, whether decided in the Courts or in Parliament, with the exceptions only of the *Horsham* and the *Galway* cases. It was recognized and acted upon by Baron Martin in the *Norwich Case;* for, although he unseated Sir Henry Stracey, he expressly declined to seat the candidate of the minority, or to hold that the votes of the majority were as if they had not been given. I need hardly say that the judge who thus decided has as much broad sense and was as little given to hair-splitting as any judge of our time.

I do not apprehend such consequences in fact as it has been suggested will follow from his view of the law. But, whatever be the consequences, I am clearly of opinion that, although Colonel Deakin's conduct has properly avoided his election and subjected him to the consequences enacted by 17 & 18 Vict. and 31 & 32 Vict., he was not at the time of the election disqualified from being a candidate so that all votes given for him after notice were in law as if they had not been given.

This being my opinion, it is, I think, not necessary to consider whether, if the disqualification had been such as I have already said I think it was not, the two farther propositions for which Mr. Drinkwater's counsel had to contend can be sustained. I content myself with saying that, as at present advised, I think they cannot.

The case is indeed free from the objection which for myself I should have found insuperable (though the Court of Common Pleas in Dublin did not find it so in the *Galway Case*), that the notice was not served upon a sufficient number of electors to turn the scale. I feel no difficulty, moreover, as to the language of the notice, which appears to me to be sufficiently definite and specific in its terms; and I entirely agree, as indeed I am in a special manner bound to do, in the general law laid down as to the throwing away of votes, in the judgment in *Gosling* v. *Veley* (1),—a judgment which was written by Sir John Coleridge. But I do not think that this case falls within that general law; and I farther think, as at present advised, that, in a parliamentary election, in order "to give effect to the notice, the disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person." These are the words of the *Clitheroe Committee.* (2) The committee go on to state that they "believe them to be in accordance with the sound construction of the law as well as with justice and reason."

I was of that opinion, and acted upon it, when, as a member of the House of Commons, I served upon the Cambridge committee, in 1866, and I retain it still.

I am therefore of opinion that the first question put by my Brother Mellor should be answered in the affirmative, and the second and third in the negative.

BRETT, J. Two questions are raised by this case. The first is, whether, assuming that the corrupt practice of which the respondent was found guilty rendered him incapable of being a candidate at the election in question, the notice given to the electors was sufficient. The second is, whether such corrupt practice did incapacitate him from being a candidate. The first question, as it seems to me, depends on the question what are the true functions of such a notice; and to answer this it is necessary to consider under what circumstances a voter throws away his vote, in the sense that the result is the same as if he had not voted. Now this proposition appears to be conceded on all hands: when there are two candidates, the one qualified to be so, and the other not, and the voter has actual knowledge of the existence of certain facts and that they by law render the latter candidate incapable of being elected, then if the voter with such knowledge chooses to vote for such candidate, he throws away his vote, and it is the same as if he had not voted. So much seems to be conceded and is shewn to be the law by the cases that have been cited. And if the voter has that knowledge he cannot prevent the legal consequence following by asserting that he did not know that the law would, under such circumstances, give the seat to the candidate that was qualified. This further proposition I also think to be correct: when there are two candidates, one qualified to be so and the other not, and such knowledge is had of existing facts, or such notice of existing facts is given to the voter, as would convince a person of ordinary care and intelligence that such facts existed, and they are such as, if he knew what legally constituted incapacity, would convince him as a person of ordinary intelligence that such incapacity existed, then if he votes for the incapacitated candidate he throws away his vote. Again, when such a notice is given of facts as would put a person of ordinary care and intelligence on inquiry, and if he exercised ordinary diligence and intelligence in such inquiry, it would lead him to the conclusion that the facts did exist which would in law incapacitate the candidate, and when the person to whom such notice is given is a person having a duty to perform with relation to the subject-matter, then he cannot absolve himself by asserting want of knowledge either of the facts or the law. Such notice is equivalent to knowledge. When the validity or invalidity of an act depends on a question of law, no one can make such act valid in law when it would otherwise be invalid by saying that he did not know the law. The case of *Reg.* v. *Mayor of Tewkesbury* (1) seems to me to be somewhat opposed to these principles, but I cannot help thinking that the decision there to some extent contravened the propositions of law that had always previously been accepted. I accept that which seems to me to have been always admitted to be the law before the case of *Reg.* v. *Mayor of Tewkesbury* (1), viz. the proposition which I have expressed, as generally applicable to all cases where notice of the law as affecting any subject-matter is material, that is to say, where by the law, if certain facts exist incapacity exists, and where by the law, if the law were known to the elector, his vote would be thrown away if he persisted in voting for the disqualified candidate, he cannot, if the facts exist to his knowledge, or if he have notice of the facts equivalent to knowledge, which by law produce incapacity for election in the candidate, render his vote valid by asserting that he did not know that the facts by law produced such incapacity, or that his vote would be thrown away if he voted for such candidate. Applying those principles to the present notice, if it were the law that personal bribery rendered the person guilty of it incapable of being a candidate I should have thought that the notice was sufficient.

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(1) 7 Q. B. 406, 434; and see 4 H. L. C. 679, 761.

(2) As reported in 2 P. R. & D. 276, 285.

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(1) Law Rep. 3 Q. B. 629.

But that raises the question whether such bribery as was here proved does render the person guilty of it incapable of being a candidate. I agree that there is nothing in the Acts concerning corrupt practices which creates such an incapacity, and that we are thrown back upon the previous law of Parliament for a solution of the question. The first thing that strikes me is, that if the petitioner's proposition is law, the point must have arisen at almost every general election in modern times. I do not mean to say that at every election there must have been bribery, but at every election some candidate must have been ready to allege bribery against his rival and to give notice of it to the electors, and yet no case can be produced in which this course has been pursued. One case was cited from the Parliamentary reports where the committee challenged the counsel engaged to produce any case in which bribery at the election in question had been held to produce an incapacity for being a candidate, and the counsel could not. Therefore, unless the *Horsham Case* (2) must be considered as a governing authority to the contrary, we are bound, as it seems to me, by the usage of Parliament, to hold that there was no incapacity in the present case.

The *Horsham Case* (2) was a very peculiar one. There being a petition, the petitioner and candidate, Mr. Fitzgerald, did not claim

(1) Law Rep. 3 Q. B. 629.

(2) 1 P. R. & D. 240.

the seat. If he had claimed it, there would have been on that petition a counter case; but, as he did not, it was not necessary. The member was unseated, and Mr. Fitzgerald stood again. The second election in many senses must be considered the same as the first; Mr. Fitzgerald was elected, but at the election a charge was made against him of corrupt practices on the former occasion, and notice was given to the electors of it. There was then a petition against Mr. Fitzgerald. If, in such a case, a Parliamentary Committee were entitled to act on what they might consider an equitable view of the case, they might well think it unfair that, from the simple fact of his not having claimed the seat on the first occasion, he should get the advantage of there being no finding of the former committee of corrupt practices against him, assuming that he was guilty of them. It might strike a committee of gentlemen of honour that this was an equitable view of the matter, but if that was the view which they acted upon, it appears to me erroneous in point of law. That decision never appears to have been accepted as correct by any of the highest authorities in parliamentary law, and the case seems to have been always considered as exceptional. I do not, therefore, think it is binding on us as an exposition of the law of Parliament. It seems to be contrary to the *Cheltenham Case* (1) and the *Clitheroe Case.* (2) I am, therefore, of opinion that if we are to determine the question on the authority of the decisions of the committees as to parliamentary usage, there is authority for holding that bribery by a candidate, even if personal, at an election, though an offence which renders that election void, does not render him incapable of being a candidate at the election. There is a manifest distinction between an offence avoiding an election and an incapacity. If a man is incapacitated, though at the election in question neither he nor any elector is guilty of a fault, the election is void. When there is bribery, that is an offence against the law, and the election will be void, but that result cannot be arrived at unless he or his agent have been guilty of a fault. Besides the decision of the parliamentary committees we may look at other authorities, such as works of acknowledged authority on the subject. It will be found that they set out long lists of facts which will produce incapacity

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(1) 1 P. R. & D. 234.

(2) 2 P. R. & D. 276.

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to be a candidate, but bribery at the existing election is never inserted in such lists. It is always treated as an offence which will avoid the election, but never as an incapacity. With regard to the statutes on the subject, it appears to me that the later statutes were intended to increase the severity of the law, but they shew that before their passing there was no such incapacity as that suggested. In 1854 the 17 & 18 Vict. c. 102 was passed. There we find in the 1st section enumerated what shall amount to bribery, and what the consequences of it shall be, viz. that it shall amount to a misdemeanor and be the subject of a fine; but it does not go on to say anything about incapacity for election. The next section gives the definition of treating, and the result of that is to be that the election shall be void; and so another section provides with regard to undue influence, but they neither of them expressly say anything about incapacity, whereas the 36th section shews that in this statute, when the legislature intended to deal with incapacity for election they used appropriate terms. [His Lordship here read the section.] So it seems to me that the Act is an authority for the view we now take. It is right to notice the fact that this Act was settled by a committee that comprised among its members the highest authorities in parliament on parliamentary usage. If they had thought that bribery had the effect alleged, they would certainly have so expressed it in the Act, whereas we find that in an Act which was most carefully considered it is expressly stated that incapacity shall rest on the being found guilty of bribery by a parliamentary committee or a jury. Such finding is made to form a necessary element to produce incapacity, and as such element cannot exist till after the election, it follows that there can be no incapacity by reason of bribery at the election at which it took place. Therefore, on the authority of the decision of the committees, of the recognised works of authority, and the later statutes, I come to the conclusion that bribery, although it amounts to an offence and avoids the election, does not render a person incapable of being a candidate. We were pressed, naturally, by the decision of the Irish judges in the *Galway Case.* (1) With regard to that I was most anxious to defer to their decision, but after considerable hesitation I have come to the conclusion that if we are really convinced that it cannot be supported in point of law, however unwilling we may be to differ from it, we are bound to say so. It is worthy of observation that the point now in question was not reserved in the *Galway Case* (1) by the learned judge who tried the case, and it seems to have been assumed that the point was so clear as not to require to be reserved. In one sense, therefore, the Court was not entitled to enter upon it; the respondent was found by the case reserved to be incapacitated. Nevertheless it is true that observations were made concerning incapacity in the course of the most carefully written and elaborate judgment of Lawson, J., and in portions of that judgment he seems to have considered that question as still open; but whether it be from the fact that the point was not in fact reserved, or that it was assumed by the judges that the point was clear without very much inquiry, it does not seem to me that the judgment is so elaborate or so clearly reasoned with respect to that point as to the rest of the case. Almost the whole contest seems to have been on the question of notice. However this may be, however reluctant I may be to differ from the decision of the Irish judges, and however much doubt it may have caused me in arriving at my present view, if that decision is to be taken to be that corrupt practices at an election render a candidate incapacitated for that election, having given the case the best consideration that I can, I have come to the conclusion that it was incorrect, and I cannot follow it. My view, therefore, is that, though the notice would have been sufficient if an incapacity had existed, there was no incapacity, and consequently the notice was of no avail. I am authorized by my Brother Denman to say that he concurs with my judgment on both points.

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(1) Ir. L. Rep. 6 C. L. 464.

Judgment accordingly.

Attorney for petitioner: *John Gurney.*
Attorneys for respondent: *Peacock & Goddard.*

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(1) Ir. L. Rep. 4 C. L. 464.

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May 22.

Ferocious Dog—Evidence of Scienter.

In order to fix the defendant with knowledge of the ferocious nature of a dog of which he was the owner, and which had bitten the plaintiff, two persons who had upon previous occasions (one of them twice) been attacked by it were called to prove that they had gone to the defendant's public-house and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid. There was, however, no evidence that these complaints were communicated to the defendant; nor was it shewn that either of the two men spoken to had the general management of the defendant's business or had the care of the dog:—

Held, by Lord Coleridge, C.J., and Keating J. (Brett, J., dissenting), that there was evidence of scienter to go to the jury.

Declaration for knowingly keeping a ferocious dog which bit the plaintiff.

Plea, not guilty. Issue thereon.

The cause was tried before Honyman, J., at the sittings in London after last Trinity Term. The facts were as follows:—The plaintiff was a turner residing in New Inn Yard, Shoreditch, and the defendant a publican residing at the Crown and Anchor, Paul Street, Finsbury. On the 12th of April, 1873, the plaintiff was in the counting-house of one Withers, a carver and turner, in Curtain Road, Shoreditch, when a large black and white Newfoundland dog (which it was admitted belonged to the defendant) rushed in from the street, and without any provocation seized the plaintiff and bit him severely on the right arm. The plaintiff went to the defendant's house to complain, and the defendant, expressing his regret, said that the boy who had charge of the dog at the time had not informed him that it had bitten any one, and requested the plaintiff to call on the following day to let him know how his arm was.

One Hunter, a furniture-dealer in Old Street, proved that on the 11th of April (Good Friday) he was going past the defendant's house, when the same dog flew out and without any provocation seized him by the seat of his trousers and tore them; that, on the following morning, at about half-past ten, he called at the defendant's house for refreshment, when the dog again made a rush at

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him; that he complained to two men who were behind the bar serving customers, expressing his surprise that they allowed such a ferocious animal to run about, and telling them that the dog had attempted to bite him on the preceding day.

Joseph Kay, a pianoforte carver, proved that three weeks before Easter he was passing the defendant's house, when a large black-and-white Newfoundland dog flew at him and caught hold of his coat and then ran away; that he pushed open the door, and, seeing a man in his shirt sleeves in the bar, inquired if the dog was his; that the man asked "Why?" and that he (witness) said, "Because he flew at me;" that a female came out and said that the master was not at home, and that he (witness) had better call when he was; and that he heard a potman (as he thought) growl at the dog, and heard the dog howl, as from the back yard.

The evidence as to the complaints by Hunter and Kay to the barmen was admitted, subject to objection.

On the part of the defendant, it was objected that there was no evidence of scienter to go to the jury. The learned judge, being of this opinion, directed a nonsuit to be entered.

Willoughby, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection.

Murphy, Q.C., shewed cause. In order to sustain an action of this sort, the plaintiff must shew not only that the dog was of a ferocious disposition, but that his owner had notice of that fact: *Thomas* v. *Morgan*. (1) It is not enough that some one in the defendant's service knew of the vicious habits of the animal: but personal notice to the defendant himself must be shewn, or at least notice to some person in his employ to whom the general control and management of the business or the care of the dog has been intrusted, and who may therefore be said to stand in the place of the owner in that respect. In *Stiles* v. *Cardiff Steam Navigation Co.* (2), the defendants were a corporation, and the evidence to shew a scienter was that on some former occasion some of the servants of the company had heard, and one of them had seen, the dog spring upon and bite some one else, but those servants had no control over the affairs of the company or over the dog: and this was held to be insufficient to charge the defendants. In *Gladman* v. *Johnson* (1), notice of the mischievous propensity of the dog, given to the wife of the defendant (a milkman), who occasionally attended to his business, which was carried on upon the premises where the dog was kept, was held to be *some* evidence of a scienter to charge the defendant. But, in giving judgment, Bovill, C.J., says: "I am not prepared to assent to the proposition that notice to an ordinary servant, or even to a wife, would in all cases be sufficient to fix the defendant in such an action as this with knowledge of the mischievous propensity of the dog: but here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife when on the premises, and for the purpose of being communicated to her husband. It may be that this is but slight evidence of the scienter, but the only question is whether it is *evidence* of it. I think it is." It is clear that notice to *any* servant will not do.

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(1) 2 C. M. & R. 496.

(2) 33 L. J. (Q.B.) 310.

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[Keating, J., referred to *Hudson* v. *Roberts*. (2)]

It may well be that, where a dog is specially consigned to the care of a servant, the servant's knowledge of its ferocious character is the knowledge of the master: *Baldwin* v. *Casella* (3): but here the only notice given was to persons who were assisting behind the bar of the defendant's public-house in his absence, and not to anyone who was shewn to have the general management of his business, or the care and control of the dog. In *Gallagher* v. *Piper* (4), knowledge or means of knowledge of a builder's foreman and general manager, as to the condition of materials supplied by him for the construction of a scaffolding, was held not to affect the master with notice of their insufficiency. No presumption is to be made as against the defendant that the information given to his servants was communicated to him.

Willoughby and *Poulter*, in support of the rule. Notice to a servant whose duty it is to communicate the fact to his master, is enough to raise a presumption of notice to the master himself: *Gladman* v. *Johnson* (1); *Baldwin* v. *Casella*. (3) The persons to

(1) 36 L. J. (C.P.) 153. [illegible]
(2) 6 Ex. 697; 20 L. J. (Ex.) 299.
(3) Law Rep. 7 Ex. 325.
(4) 16 C. B. (N.S.) 669; 33 L. J. (C.P.) 329.

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whom the notice was given here were persons who appeared to have the general charge of the defendant's business. To whom else could such a notice be given? It was not necessary for the plaintiff to shew the precise relation in which the persons to whom the communication was made stood towards the defendant. Both were present when the dog attacked the witness Hunter, and one when he attacked Kay: and according to the evidence of those witnesses, both seemed to exercise control over the animal. This was, at all events, evidence for the jury that the dog was under their charge: and that is sufficient to sustain this rule.

Brett, J. I am of opinion that this rule should be discharged. The cause of action against the defendant is, that he knowingly kept a dog of ferocious habits, which bit the plaintiff; the substantial ground of the action being his knowledge of the dog's propensity: and the question is whether there was evidence to fix the defendant. It is not absolutely necessary to shew that the owner of the dog himself had notice or knowledge; for, it has been held that notice to a person to whom the management of the defendant's business or the care and control of the dog is delegated, and who is for this purpose put in the master's place, is sufficient to bring home knowledge to the master: *Gladman* v. *Johnson* (1); *Baldwin* v. *Casella.* (2) I think there was evidence here (and properly received) that the dog was of ferocious habits. A distinction has always been taken between animals which are by nature fierce and untameable, such as tigers and others feræ naturæ, and those which are not in their general nature ferocious. If a man keeps an animal of the former class, and another is injured, the owner of the animal is liable without any evidence of a scienter; but, where the animal belongs to a class which is not habitually ferocious, it is necessary to shew that its owner has notice that it has on former occasions shewn symptoms of a disposition to bite mankind. Here it has been contended that such knowledge was brought home to the defendant, because notice of the fact of the dog having on former occasions bitten or attempted to bite other persons, was given to two or more servants in the defendant's employ,—persons who were found behind the bar of the

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(1) 36 L. J. (C.P.) 153. W.N. (1867) 75

(2) Law Rep. 7 Ex. 325.

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defendant's public-house serving customers. Who those persons were was not shewn. Now, the business of a publican consists in the buying and selling beer and spirituous liquors. A barman or a barmaid has no duty in relation to such a business, except to draw beer or liquors and to receive a price fixed by the master. A person performing that duty has no more to do with the management of the business than any shopman or woman who sells goods across the counter in any other shop. A manager whose knowledge is to fix the proprietor with notice, must be one who stands in the place of the master, and to whom the general control of the business is delegated in the master's absence. There was no evidence that such was the position of either of the persons referred to here. In *Stiles* v. *Cardiff Steam Navigation Co.* (1), the Lord Chief Justice says that notice of the vicious propensity of the dog given to porters or servants employed about the premises, would not suffice; but that, if brought home to a person who had the general management of the yard, in which the defendants themselves could not be supposed to be acting, and who had authority to say whether a dog should be kept there or not, or whether it should be chained up or not, it would be otherwise. To say that any authority is required for propositions so evident, would be to belie our sense of what takes place in every-day life. In *Baldwin* v. *Casella* (2), the decision proceeded on the ground that the entire care and management of the dog was delegated to the coachman. That is a plain and intelligible ground. And there again all the judges in terms state that notice to an ordinary servant will not do. Where a master puts his own authority in the hands of another person, it is right that the knowledge of that person should be considered as the knowledge of the master. It seems to me to be impossible to say that either of the persons to whom the communications respecting the dog were made in this case, was a person having the management of the business or the care of the dog, in the sense indicated in either of these cases; and I am aware of no case in which it has been held that notice to one standing in any other relation is equivalent to knowledge of the master. But it has been contended that there was evidence of knowledge in the master here, because

(1) 33 L. J. (Q.B.) 310. 10 Jur NS (2) Law Rep. 7 Ex. 325.

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notice was given to two persons behind the bar, and it was their duty to communicate the fact to their master, and it must be assumed that they did so: and *Gladman* v. *Johnson* (1) is supposed to be an authority for that position. I am not, however, aware that any duty is by law cast upon a servant to communicate to his master every fact that may come to his knowledge; or that, where it is necessary to prove personal notice to the master, the mere delivery of a message to a clerk or office-keeper is enough to fix the master. If *Gladman* v. *Johnson* (1) could be supposed to lay down any such principle as that, I should hold the case not to be sustainable. But, when the reasons are looked at, and the circumstances of that case, it is plain that the judges based their decision on the fact that the wife was at the time managing the defendant's business at the place where the dog was kept: notice to her was, therefore, notice to the defendant. That case in reality goes no further than *Stiles* v. *Cardiff Steam Navigation Co.* (2) I am unable to distinguish this case from *Gallagher* v. *Piper*. (3) There, the defendant's foreman knew of the insufficiency of the materials supplied for the erection of the scaffolding: and, if it was a duty imposed upon him by law to communicate his knowledge to his master, and it was to be assumed that he had done so, that case was wrongly decided; for, if the fact had been brought home to the knowledge of the master, the doctrine as to the non-liability of the master for injury to a servant through the negligence of a fellow workman would have been inapplicable. To say that the knowledge of a wife or a servant is the knowledge of the husband or the master, irrespectively of the particular position or duties of the party in relation to the husband's or the master's business, would, in my judgment, be to uproot all one's notions of commercial dealings, and to dispense altogether with the scienter in cases of this sort. Upon these grounds, I entertain a strong opinion that there was no evidence which ought to have been submitted to the jury in this case, and that the nonsuit was right.

Keating, J. I am of opinion that this rule should be made absolute. This is an action against the defendant for keeping a

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(1) 36 L. J. (C.P.) 153. 14 [illegible] 715

(2) 33 L. J. (Q.B.) 310. 10 Jur NS 1199

(3) 16 C. B. (N.S.) 669; 33 L. J. (C.P.) 329.

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ferocious dog, knowing it to be ferocious; and the question is whether there was any evidence to go to the jury of the scienter. The ferocity of the dog was undoubted; the manner of its attack upon the plaintiff sufficiently shewed that; and there was evidence that, on the previous day, the dog flew out upon a person who was passing the defendant's public house and tore his trousers, and that this person was on the same day attacked a second time, and, going into the public-house to complain, saw there two men behind the bar serving customers, that is to say, carrying on the defendant's business there so far as it could be carried on by them alone. There was also evidence that the dog had upon another occasion attempted to bite another person who was passing, and that he also went into the house and made complaint to persons whom he found there similarly occupied. The question is whether that was evidence that the defendant knew that the dog was of a ferocious disposition. It appears to me that it was, and that it was much stronger than that which this Court in *Gladman* v. *Johnson* (1) held to be some evidence for the jury. What were the facts there? The defendant was a corn-dealer and milkman, and his wife occasionally assisted in the business in his absence. A dog which was kept upon the premises where the business was carried on bit the plaintiff who lawfully went there. About four years before, upon a single occasion, the dog had bitten another person, and complaint was then made to the wife; and the Court held that this was sufficient evidence of a scienter to go to the jury, although the wife stated that she did not remember the circumstance and had not communicated it to her husband. I agree with my Brother Brett, that, if it were necessary, in order to fix him, to shew personal notice to the defendant himself or to some one who had the management of his business,—the whole business, buying as well as selling,—the information was not given to such a person here. It was, however, given to a person who was placed on the premises by the defendant for the purpose of carrying on so much of the business as consisted of selling beer and liquors and receiving the money for them. The wife in the case of *Gladman* v. *Johnson* (1) was no more the manager of the defendant's business in the sense above suggested than were the barmen and barmaid

(1) 36 L. J. (C.P.) 153. WM 15/7/5,

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in this case. The wife did not buy or sell the cows, or receive any price for the milk other than that named by her husband. It has very properly been asked by Mr. Murphy in what capacity the notices to these persons could affect the defendant. In answering that question, I prefer to adopt the language of Willes, J. All the Court agreed that the wife was not manager in the ordinary sense of the word. That learned judge says (1): "At the trial I might probably have taken the same course which my Brother Montague Smith adopted" (Mr. Justice Montague Smith had nonsuited the plaintiff, and he was one of the judges who concurred in setting the nonsuit aside); "for, four years had elapsed since the dog had attacked Mrs. Gibson's nephew, and the evidence of the scienter was certainly slight: but, in doing so, I should have been forming a judgment upon the facts, and not on the law, with which we have now to deal." "There was evidence that a boy's aunt had called at the house, and had seen there the defendant's wife, who attended to the business occasionally" (certainly not as manager), "and to whom, in the absence of the husband, the aunt communicated what had occurred; and she did so in a form which shewed that it was not meant for the wife personally, but as a message to be given to her husband. Under these circumstances, it was the duty of the wife to communicate such message to her husband" (Not her duty in the sense referred to by my Brother Brett, that is, as the general manager of her husband's business). "I think she had authority to receive it;" (On what ground? Because, in the absence of her husband, she was left by him in charge of the business at the place where the dog was kept) "and that it is not too much for us to conclude, as a matter of fact, that she probably did communicate it to her husband." I must say that, if it was not too much in that case to conclude that the complaint had reached the husband, it seems to me à fortiori not too much to conclude that the complaints reached the master here; more especially as one of the attacks took place in the house in the presence of the persons to whom the information was given. The learned judge concludes by saying,—"There was therefore evidence that he had knowledge of the ferocious character of the dog, and consequently this rule ought to be made absolute." The

(1) 36 L. J. (C.P.) at p. 155.

Lord Chief Justice also dismisses the idea of the wife being a general agent in the ordinary sense; for, he says, "Here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint was made to the wife when on the premises, and for the purpose of being communicated to her husband. It may be that this is but slight evidence of the scienter; but here the only question is whether it is evidence of it. I think it is." Montague Smith, J., agreed with the rest of the Court, and the rule was made absolute for a new trial. It seems to me that this rule also must be made absolute, unless we are prepared to overrule that case, which I for one am not. I think it is a decision which is founded upon good law and good sense. With all respect and deference to the views entertained by my Brother Brett, I concur with my lord in thinking that there was ample evidence of the scienter, and that this rule must be made absolute.

Lord Coleridge, C.J. In order to sustain this action, it was necessary for the plaintiff not only to prove that the defendant's dog, or a dog for whose misconduct he was answerable, had bitten him, but also to give some evidence that the occasion in question was not the first upon which the animal had manifested a ferocious disposition, and that knowledge of that fact had been brought to the mind of the defendant. It is not a question of the weight of evidence, but whether such evidence was given. Now, it has not been disputed that there was abundant evidence that the dog (which was admitted to be the defendant's dog) was of a ferocious nature. It was shewn that two other persons had been previously attacked by it; and the only question is whether there was evidence,—not cogent and strong, but evidence,—that these previous acts of ferocity had been brought to the notice or knowledge of the defendant. Now, the way in which it was sought to affect the defendant with such knowledge was by shewing that notice of the previous attacks was given to certain persons in the employment of the defendant,—two barmen and a barmaid. It may be taken to be quite clear that a mere notice to any servant of the owner of the dog will not do. In one of the cases, the Court say that the question is one of varying circumstances, and must depend

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upon the position of the person to whom the notice is given. Now, in the present case, the evidence was this:—[His Lordship read the evidence of Hunter and of Kay.] It appears, therefore, that, upon one of the occasions, the attack was made in the presence of two persons who were acting as barmen, selling goods to customers across the counter,—the only persons there, as far as it appeared, who I will not say managed, but who conducted the defendant's business, or had any knowledge of or were connected in any way with the dog. It was argued on the part of the plaintiff, that, upon principle as well as upon authority, the communications so made to those persons were sufficient to fix the defendant with the degree of notice necessary to sustain the action; or, at all events, that it was evidence fit to be submitted to the jury. With the greatest respect for my Brother Brett, I am of opinion that they are so. The matter may, I think, be put in either of two ways. In the first place, it may be said that the persons to whom the notice was given were in the position of managers of the defendant's business; not managers in the strict and full sense suggested by my Brother Brett, but, as in *Gladman* v. *Johnson* (1), persons intrusted, in the absence of their employer, with the conduct of his business; and that a notice to them of the vicious and ferocious nature of a dog kept about the premises where the business was so managed or conducted by them, was, upon principle and upon authority, evidence fit to be submitted to the jury of a notice to their employer. Or it may be put upon another ground, viz. that suggested in *Stiles* v. *Cardiff Steam Navigation Co.* (2) and *Baldwin* v. *Casella* (3), that, where a certain business or the performance of a certain duty is deputed to a servant, a notice to the servant so acting is a notice to the master, because he has placed the servant in his stead to represent him quoad that particular business or duty. Crompton, J., bases his judgment in *Stiles* v. *Cardiff Steam Navigation Co.* (4) upon that ground. "I quite agree," he says, "that the knowledge of a servant representing his masters and acting within the scope of their delegated authority may be competent to affect his masters with that knowledge. But, is it found in this case that any such

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(1) 36 L. J. (C.P.) 153. W.R. 15 715
(2) 33 L. J. (Q.B.) 310. 10 Jur N.S. 1199.
(3) Law Rep. 7 Ex. 325.
(4) 33 L. J. (Q.B.) at p. 312. 10 Jur N.S. 1200

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persons had knowledge, persons competent to bind the defendants by their admissions?—for, such evidence is in the nature of an admission. No doubt, there must be some such person; for, there must have been some one on the premises to control the business of the defendants. It would have been sufficient to shew knowledge in the manager or some person having the control of the yard. I had some doubt whether the knowledge must not be brought home to some person who kept and had care of the dog, and had power to put an end to the keeping of it; but perhaps it would be enough if he had the care of the dog. But all that is found is that some persons who appear rather to have had the care of the horses had seen or had heard that the dog had bitten a person before. It is more like the case of a gardener or a cook hearing that their mistress's lap-dog was given to bite; and I think that the evidence wholly fails to bring home the knowledge to any person whose knowledge in point of law would be that of the defendants." Blackburn, J., puts it still further. He says: "If they,"—that is, the persons to whom the communication was made, —" were the proper persons to have notice, what they said would be admissible, as being part of the res gestæ. But the real difficulty still remains, whether they were persons who had the control of the yard, or of the dog, or of the business, so as to be proper persons to receive notice for the company. It does not appear that they had anything to do beyond taking care of the horses, and certainly the plaintiff does not shew that they had anything to do with the dog. There was, therefore, no evidence from which the jury could reasonably presume that the defendants had knowledge of the character of the dog." *Baldwin* v. *Casella* (1) proceeded upon the ground that the defendant had deputed to his coachman the care and control of the dog, and therefore a notice to him of the vicious nature of the dog was notice to the master. I therefore think there was evidence for the jury upon that view of the case. *Gladman* v. *Johnson* (2) proceeds upon a somewhat different view of the relation of the person to whom the communication was made and the owner of the dog. But, if that was rightly decided, for the reasons given by my Brother Keating it

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(1) Law Rep. 7 Ex. 325. (2) 36 L. J. (C.P.) 153. WA (1867) 15.

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seems to me to be impossible to say that this rule should not be made absolute without directly overruling that case: I do not take the Court to have meant to hold that a notice to any servant would be sufficient: but they seem to say that it must be a question of degree in each case; and that, if a communication of this sort is made to one who, as in that case, was intrusted even occasionally only with the conduct of the defendant's business, with intent that it should come to the knowledge of the defendant, it is for the jury to say whether or not it amounts to notice to him. At the conclusion of his judgment Montague Smith, J., says: "It may be supposed that the wife did communicate the message to her husband, from the fact that they were not only living together in the same house, but that she was assisting him in the management of the business." If that was the conclusion the Court came to upon the facts of that case, it seems to me that there was evidence in this case upon which the jury ought to have been asked whether they thought the persons to whom the notice was given were persons who stood in such a relation to the defendant as to make it their duty to communicate it to him. It appears to me that all the ingredients for forming a judgment in that case exist here, and that the persons to whom the notice was given might reasonably be presumed to have had authority to receive such notice and to have made it their duty to convey it to the defendant, and that they did in fact do so. I am of opinion that the evidence ought to have been submitted to the jury, and that this rule should be made absolute.

Rule absolute.

Attorney for plaintiff: *John Long.*
Attorneys for defendant: *Fitch & Fitch.*

WILLIAMS AND ANOTHER *v.* WILLIAMS.

1874
May 26.

Landlord and Tenant—Covenant to repair—Breach—Measure of Damages.

In 1807 a lease was granted to F., containing a general covenant to repair, a covenant to repair within *three* months after notice, and a proviso for re-entry for breach. The plaintiffs, the assignees of the lessee, in 1868 granted an underlease to the defendant with similar covenants, except that the notice was to be a *two* months' notice. In September, 1872, the premises being out of repair, the reversioner served on the premises a notice to repair pursuant to the terms of the lease of 1807. The defendant not having complied with this, the plaintiffs, on the 20th of March, 1873, served him with a notice "to repair the premises in accordance with the terms of his lease;" and, being threatened by the reversioner with proceedings to enforce a forfeiture, they entered and did the required repairs themselves, and before the expiration of two months after their notice brought an action against the defendant upon the covenants in his lease:—

Held, that they were not entitled to recover substantial damages on the general covenant, the premises not being out of repair at the commencement of the action; nor could they sue on the special covenant, the action being brought too soon; as the defendant, being no party to the lease of 1807, was not bound by the earlier notice of September, 1872.

THE declaration stated that, by an indenture made on the 14th of September, 1868, between the plaintiffs of the one part and one Tonson (who died before suit) and the defendant of the other part, the plaintiffs let to Tonson and the defendant a messuage described therein, to hold for eight years, wanting sixteen days, from the 24th of June, 1868, at the yearly rent of 50*l*., payable quarterly; that Tonson and the defendant, for themselves, their heirs, &c., did, and each and every of them did thereby covenant with the plaintiffs that they, Tonson and the defendant, should and would pay unto the plaintiffs the said yearly rent or sum of 50*l*. by equal quarterly payments, on &c., in every year of the term; and also should and would, at their and his own proper costs and charges, in a good and workmanlike manner, and to the satisfaction of the agent and surveyor of the plaintiffs, their executors, &c., paint all the external wood and ironwork of the messuage and premises thereby demised once in every third year of the term thereby granted, and again in like manner in the last three months of the last year of the term; and also should and would in like manner paint, paper, whitewash, and colour the inside of

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such parts of the messuage and premises thereby demised as were then so painted, papered, whitewashed, and coloured, in the last three months of the last year of the said term. Then came a general covenant to repair and yield up in repair at the end of the term; and then followed a covenant to repair on notice, in the following terms:—"And also that it should be lawful for the plaintiffs, their executors, &c., and their agents, and also for the superior landlord of the premises, with workmen and others in their and his company or without, to enter and come into and upon the demised premises twice or oftener in every year during the term, at reasonable times in the day time, to view the state and condition thereof, and of all defects and wants of repair there found to give or leave notice in writing at or upon the said premises to and for Tonson and the defendant, their executors, &c., to repair and amend the same within the space of *two* calendar months then next following, within which time they, Tonson and the defendant, their executors, &c., should and would well and sufficiently repair and amend the same accordingly." The declaration then averred that, by virtue of that demise, Tonson and the defendant entered on the demised premises and became possessed thereof for the said term, and that the plaintiffs afterwards during the term, by their agent, pursuant to the covenant in the indenture mentioned, entered upon the demised premises, and found divers defects and wants of repair, and in manner aforesaid gave and left due notice in writing to repair and amend the same pursuant to the covenant as aforesaid. Averment, that all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiffs to recover in respect of the matters therein stated. Breach, that, during the term, 25*l.* of the rent aforesaid became due to the plaintiffs and was in arrear, for two quarterly payments of the said rent which became due on the 25th of March, 1873, for two quarters of a year of the term ending on that day; secondly, that the defendant omitted to paint all the external wood and iron-work of the messuage and premises once in the third year of the term; thirdly, that the defendant omitted well and sufficiently to repair, uphold, &c., the premises, and suffered and caused them to be out of the condition contracted for; fourthly, that the defendant omitted to repair and amend the defects and wants of repair specified in the notice in writing so given as aforesaid within the space of two calendar months then next following the giving of the said notice, and that the premises remained out of the condition covenanted for as aforesaid,—all which breaches occurred and were committed after the execution of the said deed and during the said term. Claim, 300*l.*

Pleas, 1. That there were not nor was there any such breaches or breach as in the declaration in that behalf alleged; 2. As to the fourth alleged breach, that no such defects or defect, wants or want of repair, was or were found, as alleged; 3. As to the fourth alleged breach, that notice to repair or amend was not given or left, as alleged; 4. As to the fourth alleged breach, that two calendar months next following the alleged notice had not elapsed before the commencement of the suit. Issue thereon.

The cause was tried before Brett, J., at the sittings at Westminster in Hilary Term last. The material facts were as follows: The plaintiffs were the assignees of a lease of the premises in question from Rignell Lye to Robert Foot, dated the 31st of August, 1807; and Thomas Flight, who received the ground-rent, appeared to have a reversionary interest therein. That lease contained a general covenant to repair, and also a covenant to repair after *three* calendar months' notice. On the 9th of September, 1872, Flight caused a notice to repair (specifying the repairs required) to be left upon the premises. This notice, however, did not come to the knowledge of the plaintiffs until the 17th of January, 1873, when they received the following letter from Flight:—

"London, January 17th, 1873.

"Gentlemen,—I am much surprised to receive a report from my surveyor that the repairs called for by the notice to repair served on the premises, which expired on the 9th ult., are even now incomplete. I have no wish to put you to expense for legal proceedings, if it can be avoided; and I am not unwilling to grant an extension of the time, providing some definite arrangement be made for the completion of the repairs, on the payment by you of the expense to which I have unnecessarily been put for surveyor's charges, amounting to 2*l.* 2*s.* On receipt of this amount by the 21st instant, I will forward written consent to an extension for (say) one month; otherwise, I shall be compelled to place the matter in the hands of my solicitors.

"Thomas Flight."

On the 17th of January, 1873, after receiving the above letter, one of the plaintiffs called upon the occupier of the premises, who told him that he had forwarded Flight's notice to the defendant. A copy of Flight's letter was sent to the defendant by the plaintiffs' attorney, accompanied by a letter as follows:—

"January 22nd, 1873.

"Sir,—I send you copy of a letter received from Mr. Thomas Flight, the landlord of the house in Goswell Road, addressed to Mr. W. W. Williams. It has taken Mr. Williams by surprise, as he had no knowledge of the notice to repair which was served on the premises. Mr. Williams would like to know the particulars of the repairs required to be done; and, as by the covenants of your lease they must be done by you, I have to request your attention to Mr. Flight's letter, and compliance therewith, to avoid the expense of legal proceedings.

"Wm. Thomas."

On the 20th of March, 1873, a notice was sent by the plaintiffs' attorney to the defendant requiring him to "immediately repair the premises in accordance with the terms of his lease." To this the defendant replied on the 22nd of March, "I have repaired house 336 according to the terms of my lease."

On the 24th of March the plaintiffs' attorney again wrote to the defendant, as follows:—

"Sir,—I am in receipt of your letter of the 22nd this morning. Messrs. Williams have had the house surveyed, and the surveyor has reported that it is not repaired in accordance with the covenants in the lease, and that considerable repairs remain to be done. I shall therefore be glad of a reference to your attorney, as an immediate arrangement should be come to by you with Messrs. Williams to put the premises in repair. It is a matter of importance, as the superior landlord is threatening proceedings to take possession, for which and the damages sustained by Messrs. Williams you will be liable.

"Wm. Thomas."

On the 27th of March, the defendant's attorneys wrote to the plaintiffs' attorney to know in what particulars the covenants in the lease had been broken. In reply the plaintiffs' attorney on the 2nd of April sent them the report of the surveyor (Mr. Houle) as to the repairs necessary, inclosed in the following letter:—

"Dear Sirs,—I herewith send you particulars of the repairs required to be done under the covenants of the lease to Mr. John Williams and his late partner Mr. Tonson; and the repairs are being proceeded with by the lessors, they being threatened with proceedings in ejectment.

"Wm. Thomas."

The plaintiffs, in order to avoid a forfeiture, accordingly did the necessary repairs, at a cost of 36*l.* 14*s.* This action was commenced on the 13th of May.

On the part of the defendant it was contended that, the repairs having been done by the plaintiffs before action brought, they could not recover under the general covenant to repair, and that the two months' notice required by the lease of the 14th of September, 1868, not having expired at the time of action brought, the plaintiffs could not recover on the covenant to repair after notice.

For the plaintiffs it was insisted that the letter of the plaintiffs' attorney of the 22nd of January, 1873, was a sufficient notice.

The learned judge ruled that the plaintiffs could not recover upon the breaches which charged an omission to repair, the premises not being out of repair at the time of bringing the action, and that the letter of the 22nd of January, 1873, was not a sufficient notice; and he directed a verdict for the plaintiffs on the first breach for 25*l.*, and for the defendant on the other breaches,—leave being reserved to the plaintiffs to move to enter the verdict for them on the third and fourth breaches, and to increase the damages by 36*l.* 14*s.*, the amount expended by them in repairing the premises.

Huddleston, Q.C., in Hilary Term last, obtained a rule nisi.

E. Pollock shewed cause. The plaintiffs can only recover if the defendant has broken both the general covenant to repair and the covenant to repair after notice prior to the commencement of the action. Flight's notice under the lease of the 31st of August, 1807, was no notice to the defendant to repair under his lease from the plaintiffs, the terms of the covenants in the two leases not being identical. The two months' notice given under the defendant's lease on the 20th of March, 1873, had not expired on the 13th of May, when this action was brought: and at that time the repairs had been done; consequently, there was no injury to the reversion, in respect of which the plaintiffs could sue: *Walker* v. *Hatton* (1); *Mills* v. *East London Union.* (2)

Udall (*Huddleston, Q.C.*, with him), in support of the rule. The covenants to repair are substantially the same in both leases. The question is whether, where the superior landlord gives a notice to repair to his lessee, and the latter gives notice to his sublessee, and upon his default goes in and does the necessary repair, the lessee cannot recover against his sublessee. The affirmative of that proposition was expressly held in *Colley* v. *Streeton.* (3)

[GROVE, J. There the sublessee had proper notice to repair before the commencement of the action.]

In *Davies* v. *Underwood* (4), the defendant, an underlessee, who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord brought ejectment and evicted the plaintiff and defendant: and it was held that the plaintiff was notwithstanding entitled to recover against the defendant substantial damages for the non-repair of the premises. In *Rawlins* v. *Morgan* (5), the defendant held premises under a lease, with a covenant to keep and yield them up in repair. At the expiration of the lease, the premises were dilapidated to an amount fixed by the jury at 22*l.* The plaintiff (the reversioner) had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises for the purpose of rebuilding them: and it was held that the plaintiff was notwithstanding entitled to recover substantial damages. These authorities shew that the plaintiffs are entitled to maintain this action upon the general covenant to repair, for the amount they have been compelled to expend upon the premises in order to sustain their lease. At all events, they are entitled to recover upon the fourth breach. The covenants in the two leases being substantially the same, the notice from Flight was a sufficient notice under the defendant's lease.

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(1) 10 M. & W. 249.

(2) Law Rep. 8 C. P. 79.

(3) 2 B. & C. 273.

(4) 2 H. & N. 570; 27 L. J. (Ex.) 113.

(5) 18 C. B. (N.S.) 776; 34 L. J. (C.P.) 185. 11 Jur N S 504

(4) S C 8 Jur N S 1223

[BRETT, J. It professes to be a notice under the lease from the superior landlord.]

It gives the defendant notice that there is a superior landlord who, in the event of the repairs not being done, may sue for the forfeiture.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. The premises in question were originally demised by Lye to Foot, by a lease dated the 31st of August, 1807. The interest of the lessor, by certain mesnes assignments, became vested in Flight. The plaintiffs, to whom the interest of the lessee under that lease had come, by a lease of the 14th of September, 1868, demised the premises to one Tonson (since deceased) and the defendant. The original lease contained the usual covenant to repair and to yield up in repair, and also a covenant to repair within *three* months after notice. The underlease contained similar covenants, except that the notice stipulated for was a *two* months' notice. In January, 1873, a notice was given by Flight to the assignees of Foot (the plaintiffs), calling upon them to perform certain repairs pursuant to the lease of August, 1807. This notice was left with the occupier of the premises in September, 1872, but did not reach the hands of the plaintiffs until the 17th of January, 1873. The defendant, being no party to the lease of August, 1807, and not being bound by the covenants contained therein, took no notice of Flight's requisition, which called upon his landlords to do the repairs within *three* months. On the 20th of March, 1873, the defendant received a notice from the plaintiffs' attorney requiring him to repair the premises "in accordance with the terms of his lease." This lease, which is before us, contains no covenant as between the plaintiffs and the defendant importing into it the covenants contained in the original lease of 1807. The notice of January, 1873 (if it amounted to a notice), therefore, was a notice to do something which the defendant was in no manner bound to do. So the matter stood down to the 20th of March, 1873, when a substantive notice was given to the defendant to repair pursuant to the terms of the underlease of the 14th of September, 1868, which contained, besides the covenant to repair generally, a specific covenant to repair within *two* months after notice. It may be that, if there had been a breach of this last-mentioned covenant, the measure of damages which the plaintiffs would have been entitled to recover would have been the expenses which they had incurred in putting the premises in repair. The two months which the defendant had for the performance of the covenant, however, had not expired when his landlords brought their action. The only breaches relied on are the third, which is founded upon the general covenant to repair, and the fourth, which is founded upon the special covenant to repair within two months. Now, the answer to the first of these is that no substantial damages can be recovered under the general covenant where no damage has been done to the reversion, and the reversioner has not been injured by anything done or omitted to be done by the defendant. And the answer to the second is, that the action is brought too soon. *Walker* v. *Hatton* (1) is an express authority in favour of the defendant, and it does not in any way conflict with *Colley* v. *Streeton.* (2) *Davies* v. *Underwood* (3) was a case where the mesne landlord had determined his lease by his own act; and it was held that that did not prevent his recovering substantial damages for the defendant's breach of covenant whilst he continued to be the owner of the reversion. Whether, therefore, upon principle or upon an examination into the details of the authorities, I am of opinion that there is no ground for disturbing the verdict.

BRETT, J. The lease to Tonson and the defendant contained a general covenant to repair, a covenant to yield up the premises in repair, and a covenant to repair after two months' notice, and the lessors reserved to themselves a right of re-entry for a breach of either of these covenants. The lessors would also have an implied right to sue for damages: but they had no right to go upon the premises and do the repairs themselves. It is admitted that the premises were out of repair. But, instead of availing themselves of the right of forfeiture, the plaintiffs do the necessary repairs themselves, in order to save a forfeiture as between themselves and the superior landlord; and they claim to be entitled to recover the expenses thus incurred as damages under the third breach. This they cannot do. Then it is said that they are entitled to recover them on the fourth breach, non-repair after notice. But, upon receipt of a proper notice to repair, the defendant had two months within which to do the repairs. Flight's notice to the plaintiffs under the original lease was clearly no notice to the defendant under the lease of September, 1868: and this action was brought before the expiration of the notice given to him under that lease. The plaintiffs, therefore, cannot recover under the fourth breach. All that the plaintiffs could have been entitled to would be nominal damages under the third breach; but that point was not taken at the trial. The rule must, therefore, be discharged.

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(1) 10 M. & W. 249.

(2) 2 B. & C. 273.

(3) 2 H. & N. 570; 27 L. J. (Ex.) 113.

GROVE, J. I am entirely of the same opinion, and have nothing to add.

Rule discharged.

Attorney for plaintiffs: *William Thomas.*

Attorney for defendant: *E. D. Eagles, for Evans, Laing, & Eagles.*

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June 2.

HALLIDAY *v.* HARRIS.

Bankruptcy—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71) s. 72—*Injunction by County Court to restrain Proceedings in a Vice-Admiralty Court abroad —Prohibition.*

Sect. 72 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts that "every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case":—

Held, that this section gives any court of bankruptcy jurisdiction to determine as matter of fact the expediency or necessity for entertaining and deciding any question which affects the realisation and distribution of the property of the bankrupt,—subject only to the appeal given to the chief judge in bankruptcy and the Court of appeal in Chancery by s. 71.

Therefore, where a judge of a county court had "deemed it expedient" to restrain a person trading in London from enforcing in a Vice-Admiralty Court abroad a claim of lien on a ship (part of the bankrupts' estate) for necessaries supplied abroad on the orders of the captain after the filing of the petition, and to direct an issue to try the matter in his court, this Court refused to grant a prohibition,—holding that the county court had by its decision given itself jurisdiction, subject only to appeal.

Semble, per Brett, J., that the matter was not one which a county court having no Admiralty jurisdiction ought to have entertained.

CERTAIN persons carrying on business at Manchester under the style or firm of Child, Mills, & Co., filed a petition for liquidation under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 125, in the county court of Lancashire holden at Manchester, on the 13th of December, 1872, and were thereupon adjudicated bankrupts; and James Halliday was appointed trustee.

In September, 1873, the trustee discovered that a steam-ship named *Sir Arthur Kennedy*, then on the West Coast of Africa, was at the date of the petition in the reputed ownership of the bankrupts. The *Sir Arthur Kennedy* had prior to the petition for liquidation been mortgaged by the bankrupts to the Ratcliff Investment Society. There had also been a transfer of the mortgage by the society to Dr. Lancashire; but neither the original mortgage nor the transfer was registered under the Merchant Shipping Act (1) until the 14th of December, 1872.

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(1) 17 & 18 Vict. c. 104, ss. 67, 73.

A suit was instituted by the trustee in the Manchester county court to declare the reputed ownership of the *Sir Arthur Kennedy* to have been in the bankrupts at the date of the filing of the petition, and to order the registrar in London to cancel the registration of the mortgage and transfer, and to register the ship in the name of the trustee; and an order to that effect was made, and the trustee was, on the 11th of October, 1873, registered as owner accordingly.

Before the trustee had become aware of his rights with respect to the *Sir Arthur Kennedy*, a compromise had been entered into between him and Harris of a claim which the former had as trustee against the latter as a debtor to the estate of the bankrupts, the result of which was that Harris, by a deed dated the 30th of August, 1873, covenanted to pay to the trustee a sum of 30,000*l.* by certain instalments. At the time this compromise was entered into, Harris was equally unaware that the trustee had any rights in respect of the *Sir Arthur Kennedy;* but, as soon as the trustee asserted his claim, Harris set up a claim of lien on the ship for 3350*l.* for necessaries alleged to have been supplied to her by him or his agents, on the orders of the captain whilst on the coast of Africa, and subsequently to the filing of the petition by Child, Mills, & Co., and to the appointment of Halliday as trustee: and in January, 1874, Harris caused the ship to be arrested in the Vice-Admiralty Court at Sierra Leone for the debt so alleged to have been contracted. According to Harris's affidavit, his claim in respect of necessaries supplied to the *Sir Arthur Kennedy* was known to the trustee at the time of the compromise above referred to, but was excluded from consideration, the trustee asserting that he as trustee had no interest in the ship, she being mortgaged to her full value.

On the 7th of February, 1874, the trustee obtained from the county court at Manchester an interim injunction to restrain Harris (who carried on business in London) from proceeding to enforce his lien upon the *Sir Arthur Kennedy* in the Vice-Admiralty Court at Sierra Leone, and to have the claim for necessaries supplied to her tried in the county court. After hearing counsel on both sides, the judge of the Manchester county court, on the 26th of February, 1874, made an order restraining the defendant

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(Harris) from proceeding with the suit in the Vice-Admiralty Court at Sierra Leone, and directing certain issues for the purpose of trying the claim of lien in the county court. This order was not appealed from; but, on a former day in this term,

Hilbery, on behalf of Harris, obtained a rule nisi for a prohibition to the judge of the Manchester county court, to restrain him from further proceeding with the cause, on the ground that both the subject-matter and the parties were beyond the jurisdiction of that court. The affidavit upon which the motion was founded, after detailing the proceedings in the liquidation, stated that all the books and papers connected with the transactions between Harris and the captain of the *Sir Arthur Kennedy* were abroad, as also were all his witnesses; that all the transactions between them took place at Sierra Leone and the neighbouring ports; and that the matter could be disposed of more conveniently and expeditiously, and at less expense, at Sierra Leone than in the county court at Manchester.

June 2. *Ambrose* shewed cause. The bankrupts, Child, Mills, & Co., carrying on business at Manchester, the Manchester county court had jurisdiction over the matter of their petition: 32 & 33 Vict. c. 71, s. 59. The constitution and jurisdiction (and its limits) of the London Court of Bankruptcy are defined by ss. 60, 61, and 65, and those of the county court in bankruptcy by ss. 59 and 66. Sect. 71 provides for appeal in these words,—"Any person aggrieved by any order of a local bankruptcy court in respect of a matter of fact or law made in pursuance of this Act may appeal to the Chief Judge in bankruptcy; and it shall be lawful for such judge to alter, reverse, or confirm such order, as he thinks just." And "any order made by the Chief Judge in bankruptcy, whether in respect of a matter brought before him on appeal or not, shall be subject to an appeal to the Court of appeal in Chancery." Sect 72,—upon which the question before the Court turns,—enacts that, "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case; and no such Court as aforesaid shall be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions except in manner directed by this Act; and if in any proceeding in bankruptcy there arises any question of fact which the parties desire to be tried before a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may direct such trial to be had, and such trial may be had accordingly, in the London Court of Bankruptcy in the same manner as if it were the trial of an issue in one of the superior Courts of common law, and in the county court in the manner in which jury trials in ordinary cases are by law held in such court." The *Sir Arthur Kennedy* was an asset of the bankrupts at the time of the filing of the petition; and a question of lien having arisen, it was essential that that should be decided in order that the estate might be distributed. The county court therefore had jurisdiction under s. 72 to try the question, and consequently power to restrain the claimant from enforcing his lien in the Vice Admiralty Court: *Ex parte Anderson.* (1) Referring to s. 72, Lord Justice Giffard there says (2): "The terms of this clause, in my opinion, give the Court (3) complete jurisdiction to decide every question that it may consider necessary to decide with a view to the distribution of the bankrupt's estate. Is or is not the question in the present case one which it is necessary to decide with a view to the distribution of the bankrupt's estate? I am clearly of opinion that it is. I have no doubt it was the intention of the legislature that the Bankruptcy Courts should be complete and sufficient in themselves, and that they should, for the purpose of making a complete distribution of the bankrupt's property, exercise at least all the powers possessed by any judge of the Court of Chancery." That case was followed by *Ex parte Rumboll.* (4)

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(1) Law Rep. 5 Ch. 473.

(2) Law Rep. 5 Ch. at p. 479.

(3) The county court sitting in bankruptcy.

(4) Law Rep. 6 Ch. 842.

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Ex parte Cohen (1), is precisely in point. It was there held that the Court of Bankruptcy has power to restrain a creditor from bringing against the trustee under a liquidation an action upon a bill of sale given by the debtor, the validity of which is disputed by the trustee. Lord Justice James there says: "I am clearly of opinion that this is just the case to which the Act is intended to apply. Here is a question whether these goods belong to the bankrupt's estate; and all such questions are now to be tried in the Court of Bankruptcy. The question must be determined in order to distribute the estate of the bankrupt; and, instead of allowing whatever is left of the estate to be frittered away in litigation, the legislature has determined that there should be one Court to decide all these questions. We should be very wrong if we were to decide this case so as to throw any doubt upon the subject." And Lord Justice Mellish adds: "For the purpose of getting a better distribution of the estate, the Court of Bankruptcy, and no other Court, is to decide questions relating to that estate. No other Court is to restrain proceedings in the Court of Bankruptcy; and the Court of Bankruptcy has power to restrain proceedings in any other Court." In *Morley* v. *White* (2), a testator up to his decease carried on business in partnership with his son. The capital belonged to the father, and the articles contained provisions vesting the son's share immediately on the father's death in the father's executors. The father by will appointed the son and two other persons executors, with discretionary powers to sell the business to the son and to continue it in the meantime. The son alone proved, and he continued the business with the testator's assets, and within a year from the father's death a suit was instituted by separate creditors of the father for the administration of his estate. A receiver was appointed in the suit, and shortly afterwards a trustee was appointed under a liquidation petition which had been presented by the son before the receiver was appointed. The bill was amended by making the trustee a party, and praying an injunction to restrain him from meddling with the estate of the testator. The registrar in bankruptcy refused an application by the trustee for an injunction to restrain

(1) Law Rep. 7 Ch. 20.

(2) Law Rep. 8 Ch. 214.

the plaintiffs from taking any proceedings in the suit for the purpose of interfering with the realisation and distribution of the stock-in-trade and effects of the firm; and Malins, V.C., in the suit granted an injunction to restrain the trustee from interfering with the testator's assets, unless he should pay into Court, in the names of the receiver and himself, a sum of 48,000*l.* realised from the assets of the business. The Lords Justices held,—reversing both decisions,—that the Court of Bankruptcy was the proper forum for deciding the questions arising between the estates of the father and the son, and that the injunction in Chancery must be discharged, and an injunction in bankruptcy granted to restrain the plaintiffs from taking any proceedings in Chancery against the trustee in respect of any property come to his hands. In pronouncing judgment, Lord Justice James said: "It appears to me that the Court of Bankruptcy is the proper tribunal to determine the questions arising in this matter. The case is one which shews how beneficial is the effect of the 72nd section. There are, no doubt, questions between the father's estate and the son's estate, which have been mixed up together,—questions between the joint creditors of the father and son, the separate creditors of the father, and the separate creditors of the son. These questions must be determined somewhere before the assets can be distributed among the creditors. If the orders under appeal are to stand, the result must be that the whole administration of the estate, and its division among the creditors according to their respective rights, will be delayed until the suit is determined. It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made: but the Court of Bankruptcy is armed for that purpose with every power of a Court of law and a Court of equity; and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of Bankruptcy which the legislature has thought to be the proper tribunal for the determination of it: and those questions, if decided in bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same judges sitting under one name instead of under another. Under these circumstances, I am of opinion that the proper forum to determine every

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one of those questions is the Court of Bankruptcy." An attempt was subsequently made to re-open the question, but without success: *Ex parte Morley.* (1) There has been nothing to qualify these decisions, except the observations of Lord Justice James in *Ex parte Lyons* (2), which do not, however, affect in any degree their application to the present case. The real test is whether the exercise of jurisdiction by the Court of Bankruptcy is necessary for the purpose of having the assets administered in the bankruptcy. *Ellis* v. *Silber* (3), which may be cited on the other side, merely decides that the jurisdiction of the Court of Chancery is not taken away by the Bankruptcy Act, 1869, merely because a trustee in bankruptcy may have a claim in respect of the bankrupt's estate against a third person.

[BRETT, J. What jurisdiction has the Manchester county court over the Vice-Admiralty Court of Sierra Leone? or how could it be enforced?]

The Manchester county court has no jurisdiction over the Vice-Admiralty Court at Sierra Leone: but it might attach Harris through the Bankruptcy Court in London, if he proceeded in that Court in contempt of its order. (4)

Hilbery, in support of the rule. The powers conferred upon the Bankruptcy Court under s. 72 are to be "subject to the provisions of that Act:" and s. 83, subs. 7, enables any person having a claim against the trustee to sue him. *Ellis* v. *Silber* (3) is a distinct authority to shew that the jurisdiction of the Court of Bankruptcy is restrained to matters which are properly and exclusively within it. "For all the purposes of administration in bankruptcy," says

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(1) Law Rep. 8 Ch. 1026.

(2) Law Rep. 7 Ch. 494.

(3) Law Rep. 8 Ch. 83.

(4) Under 32 & 33 Vict. c. 71, s. 74, which enacts that "The London Bankruptcy Court, the local bankruptcy court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and any British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be ancillary to each other in all matters of bankruptcy; and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by such order the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

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Lord Selborne (1), "the Court of Bankruptcy is armed with very large powers, both legal and equitable,—as large as may be necessary to do complete justice. But there was no case cited and no clause quoted from any Act of Parliament to the effect that, whenever the trustees of a deed or the trustee or assignee in bankruptcy has a demand against a third person which but for the bankruptcy would be proper to be prosecuted in a Court of law or in a Court of equity, the jurisdiction of the Court of law or of the Court of equity is as against that person transferred to the Court of Bankruptcy." The jurisdiction of the Court of Admiralty was considered in *Smith* v. *Brown.* (2) In *In re Motion* (3), it was held that s. 72 of the Bankruptcy Act, 1869, does not enable the Court of Bankruptcy to draw within its jurisdiction property or the owners of property not vested in the trustee, and not originally subject to the administration in bankruptcy; and à fortiori does not authorize the Court to work out a decree which has been made in Chancery against such persons.

[LORD COLERIDGE, C.J. Do you find any case where a Court of Bankruptcy has deemed it expedient or necessary to decide a question of law or fact arising before it, for the purpose of doing complete justice or making a complete distribution of the bankrupt's property, and any other Court has interfered to prevent it?]

Re Motion (3), and the judgment of Lord Justice James there, are totally inconsistent with *Ex parte Cohen.* (4)

[LORD COLERIDGE, C.J. In *Re Motion* (3), the whole of the assets had been realised, and 20*s.* in the pound had been paid to the creditors.]

The claim of Harris arose since the filing of the petition: with reference to this claim, he is a perfect stranger to the bankruptcy. A mortgagee cannot be restrained from enforcing his rights by the Court of Bankruptcy: *White* v. *Simmons.* (5)

[LORD COLERIDGE, C.J. If the court at Manchester is improperly exercising jurisdiction in the matter, the remedy is pointed out by s. 71. Prohibition will not lie.]

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(1) Law Rep. 8 Ch. at p. 86.

(2) Law Rep. 6 Q. B. 729.

(3) Law Rep. 9 Ch. 192.

(4) Law Rep. 7 Ch. 20.

(5) Law Rep. 6 Ch. 555.

If the goods had been supplied to the *Sir Arthur Kennedy* before the bankruptcy of Child, Mills, & Co., Harris would have been in the position of a secured creditor: *The Bold Buccleugh* (1); *The Ella A. Clarke* (2): but, if he were successful upon this issue, the county court has no machinery for enforcing a judgment in his favour.

Ambrose, in reply. Assuming that the last argument urged is well founded, however improvident the county court may have been in assuming to exercise a jurisdiction which does not properly belong to it, the only remedy of the party aggrieved is by appeal in the way pointed out by s. 71.

Cur. adv. vult.

LORD COLERIDGE, C.J. This is an application to this Court for a prohibition to the county court at Manchester under the following circumstances:—A firm carrying on their business as Child, Mills, & Co., were adjudicated bankrupts on the 13th of December, 1872, on a petition for liquidation. In that liquidation, the plaintiff was appointed trustee; and, in September, 1873, he discovered that a ship named *Sir Arthur Kennedy* had been in the reputed ownership of the bankrupts at the date of the petition. There had been certain mortgages of the ship, which the plaintiff by a suit in the county court succeeded in setting aside; the registration of the mortgages was cancelled, and the plaintiff was placed upon the register, and became the owner of the *Sir Arthur Kennedy.* Pending these proceedings, and while both parties were ignorant of any claim on the part of the plaintiff to the ship, he and the defendant had entered into a compromise as to certain claims of the plaintiff as trustee upon the defendant as a debtor to the estate of Child, Mills, & Co., for a sum of 30,000*l.*, to be paid by the defendant by instalments. As soon, however, as the title of the plaintiff to the ship was discovered, the defendant put forward his claim for having supplied her with necessaries to the extent of 3500*l.*, and seized her under process of the Vice-Admiralty Court at Sierra Leone. Thereupon, Halliday, the now plaintiff, asked for an injunction in the county court to restrain the now defendant, Harris, from prosecuting his suit in the Vice-Admiralty Court at Sierra

(1) 7 Moo. P. C. 267. (2) Brown. & Lush. 32; 32 L. J. (P. M. & A.) 211.

Leone, which was granted ad interim, and issues were ordered to be tried to settle the questions between the parties. The now defendant, although his counsel objected at the hearing to the jurisdiction of the county court, acquiesced apparently in the decision of the county court after it was pronounced, and intimated through his attorney that he had no intention to appeal. He now applies to this Court for a writ of prohibition to prevent the county court from continuing the injunction against which he has not appealed, on the grounds,—first, that this is not a matter within the words of s. 72 of 32 & 33 Vict. c. 71, and secondly, that, even if it were within the letter of the section, it is not within its real meaning, as this is essentially an Admiralty cause, and the county court has not and was never intended to have Admiralty jurisdiction.

We were properly enough referred to some of the preceding sections of the Act. But the important section, and the one upon which the matter really turns, is the 72nd. It runs as follows:—"Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case: and no such Court as aforesaid shall be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions, except in manner directed by this Act; and if, in any proceeding in bankruptcy, there arises any question of fact which the parties desire to be tried before a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may direct such trial to he had, and such trial may be had accordingly, in the London Court of Bankruptcy in the same manner as if it were the trial of an issue in one of the superior Courts of common law, and in the county court in the manner in which jury trials in ordinary cases are by law held in such court."

Now, it is to be observed that, in the case before us, both parties had been parties to the liquidation; and that, the ship *Sir Arthur*

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Kennedy being part of the bankrupts' estate now in liquidation, the claim of Harris is a matter which it is clearly very desirable to decide, for the purpose of making a complete distribution of the bankrupts' property. It comes, therefore, within the very words of s. 72; and it is impossible to say that the court has exceeded its jurisdiction in issuing the injunction against Harris, which injunction can be enforced against him personally through the machinery of the Bankruptcy Court in London in the manner pointed out in the statute. This is the point and this is the only point which I decide.

The inconveniences arising out of the exercise of a jurisdiction in this particular case were very well pointed out by Mr. Hilbery. But if, as may be the case, jurisdiction has been improperly exercised, that is matter for appeal to the Chief Judge and to the Lords Justices, and is no ground for applying to this Court to issue a writ of prohibition. The distinction pointed at in these words is the true solution of the variance rather than conflict in the several cases from the Courts of equity which were cited upon the argument.

In some of these cases, the proceedings of the local bankruptcy courts were upheld, in others they were reversed or varied. But the jurisdiction of the Court in such a case as this does not appear to have been ever questioned. It was asserted in very strong terms by Lord Justice Giffard in *Ex parte Anderson* (1); and the language of the two present Lords Justices in *Ex parte Cohen* (2) goes still further. In fact, Sir George Mellish lays down in precise terms the very jurisdiction which has been exercised but is disputed in this case. The cases cited to us of the class of which *Ellis* v. *Silber* (3), decided by Lord Selborne, is the strongest of them all, do not really conflict with, and were certainly not intended to overrule, the two cases I have mentioned, and which appear to me to have been correctly decided. They only shew, either that, when the Court of Chancery has possession of a case, it does not lose its hold over it by a subsequent bankruptcy, or that the Court will relieve against any want of equity which is the result of bankruptcy proceedings, or that the exercise of jurisdiction by the

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(1) Law Rep. 5 Ch. 473.

(2) Law Rep. 7 Ch. 20.

(3) Law Rep. 8 Ch. 83.

Bankruptcy Court itself has been corrected upon appeal where it has been improperly exercised.

No case has been cited, and I presume none can be found, where a common-law Court has prohibited the Court of Bankruptcy, in the face of the direct words of the 72nd section. I decline to make such a precedent; and I think Mr. Harris must be left to correct the Court of Bankruptcy, if it is in error, by the ordinary course of appeal.

BRETT, J. I am of the same opinion. The bankruptcy proceedings were properly instituted in the county court of Manchester, inasmuch as the bankrupts carried on business at Manchester. In the course of the proceedings a claim was made to a certain ship as part of the bankrupts' estate. The ground on which it was asserted that the ship was the property of the trustee was, that the ship was in the apparent ownership of the bankrupts at the time of the bankruptcy. I find some difficulty in seeing why the assertion took that form, as the bankrupts were the registered owners of the ship, and, though the ship was mortgaged, the mortgages were not registered; and, even if they had been, the bankrupts were the owners of the ship subject to the mortgages. It was asserted that the ship had been seized by the defendant on proceedings in the Vice-Admiralty Court of Sierra Leone, for necessaries supplied at Sierra Leone. Upon these facts appearing, the county court judge at Manchester determined that he deemed it expedient to decide the question whether the necessaries were supplied, for the purpose of doing complete justice, and making a complete distribution of the estate.

How it became necessary to decide this question on these grounds at Manchester, I can hardly understand. Whether the necessaries were supplied before or after the bankruptcy, if they were supplied, the defendant had a maritime lien on the ship, which lien, whether the ship belonged to the bankrupts or not, the trustee could not get rid of; and whether the necessaries were in fact supplied at Sierra Leone would seem to be more fit to be tried there than at Manchester. But the county court judge certainly had jurisdiction to determine as a matter of fact "whether he deemed it necessary to enter into this inquiry;" and, having so deemed it, he has given himself jurisdiction to enter upon the inquiry. If Harris had resided out of the kingdom, I should have thought the county court had no jurisdiction; but he carried on business in London; and by the machinery given by the Bankruptcy Act, 1871, the county court can exercise authority over him through the London Court of Bankruptcy. If the attempt on the part of the county court had been to prohibit the Vice-Admiralty Court of Sierra Leone from proceeding, I should have thought it was a monstrous exercise of authority. But I do not understand that the effect of the action of the county court would be to prevent the Court at Sierra Leone from proceeding if the defendant chose to go on there; but only that, if he does so, he may be subject to imprisonment for contempt of the authority of the Court of Bankruptcy. I doubt whether the county court is in fact rightly exercising this jurisdiction; and I have a strong opinion that, if this case had been taken on appeal before the Lords Justices, they would have held that this was not a matter that the county court ought to entertain. It has no efficient machinery, if it decides that these necessaries were supplied, for enforcing its judgment in favour of the defendant; and, as its judgment cannot be effective in his favour, it ought not to decide against him. It seems to me, however, that this was matter for appeal, and that the present application is the wrong mode of resisting the proceedings of the county court. I therefore agree with the judgment of my Lord, that this is not a case for a prohibition.

Rule discharged.

Attorneys for plaintiff: *Phelps & Sidgwick, for Sale, Shipman, Seddon, & Sale, Manchester.*

Attorney for defendant: *F. W. Hilbery.*

KELLY *v.* PATTERRSON.

1874
July 8.

Landlord and Tenant—Notice to Quit—Tenant permitted to continue in Possession (without express Stipulation) after the Expiration of his Landlord's Lease.

Premises were let by the owner in fee on a lease expiring at Midsummer, 1866. The lessee underlet to the defendant on a lease from year to year commencing at *Michaelmas.* The defendant was in possession at Midsummer, 1866 (when the lease of his immediate lessor came to an end), and the owner in fee granted a new lease to the plaintiff as from that time. The defendant, who continued to occupy the premises, paid the plaintiff a sum equal to a quarter's rent on the terms on which he had held the premises, as for rent from Midsummer to Michaelmas, 1866, at which time the plaintiff insisted upon an increase of 5*l.* per annum on the rent, and such increased rent was thenceforth paid by the defendant. In December, 1873, the plaintiff gave the defendant a six months' notice to quit at *Midsummer* :—

Held, by Brett and Denman, JJ. (the latter with some doubt), that the notice was bad,—the defendant having been allowed to hold over the expiration of the lease originally granted to him, without any explanation or fresh stipulation (save as to the increased rent); and consequently the inference being that there was a tacit agreement between him and the plaintiff that he should continue to hold as tenant from year to year according to his original holding, that is, as from Michaelmas to Michaelmas.

Ejectment. The premises in question had been let to one Hudson on a lease which expired at Midsummer, 1866. Hudson had underlet to the defendant from year to year, commencing at Michaelmas. At Midsummer, 1866, Hudson's term came to an end, and a fresh lease was granted to the plaintiff. The defendant still remained in occupation of the premises, paid the plaintiff at Michaelmas, 1866, a sum equal to a quarter's rent on the terms upon which he had theretofore held: but the plaintiff insisted upon an advance of 5*l.* per annum upon the rent, which the defendant paid down to Christmas, 1872, when the plaintiff gave him a notice to quit at Midsummer, 1873. The defendant insisted that this notice was insufficient, and at the expiration of the six months refused to quit, contending that his tenancy was one ending at Michaelmas.

At the trial before Honyman, J., at the sittings in Middlesex after last Trinity Term, a verdict was found for the plaintiff,

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subject to leave to the defendant to move to enter a nonsuit, on the ground of the insufficiency of the notice to quit.

Macrae-Moir in Michaelmas Term last obtained a rule nisi.

May 25. *Paterson* shewed cause, citing *Doe* d. *Monck* v. *Geekie* (1), *Doe* d. *Buddle* v. *Lines* (2), and *Crowley* v. *Vitty.* (3)

Macrae-Moir, in support of the rule, referred to *Roe* d. *Jordan* v. *Ward* (4), *Doe* d. *Collins* v. *Weller* (5), *Doe* d. *Holcomb* v. *Johnson* (6), *Doe* d. *Savage* v. *Stapleton* (7), *Doe* d. *Cornwall* v. *Matthews* (8), and Woodfall's Landlord and Tenant, 10th ed. p. 299.

Cur. adv. vult.

July 8. The judgment of the Court (Brett and Denman, JJ.,) was delivered by

LORD COLERIDGE, C.J. I proceed to deliver the judgment of my Brother Brett in this case, which was argued in Easter Term last before him and my Brother Denman only.

In this action of ejectment the facts proved were, that the premises had been let by the owner in fee on a lease expiring at Midsummer, 1866. The intermediate lessee had during his tenancy underlet to the defendant on a lease from year to year commencing at Michaelmas. The defendant was in possession at Midsummer, 1866, when the lease of his immediate lessor, and therefore his own lease, came to an end. At Midsummer, 1866, the owner in fee let the premises on a new lease to the present plaintiff. The plaintiff, instead of entering into personal possession of the premises, left them in the occupation of the defendant. The defendant afterwards paid a sum equal to a quarter's rent, on the terms on which he had held the premises from year to year, to the plaintiff, as for rent from Midsummer to Michaelmas, 1866, from which time the plaintiff insisted upon a rent increased by 5*l.* per annum; and such increased rent had been thenceforth paid by the defendant to the plaintiff. The plaintiff in 1872 gave the

(1) 5 Q. B. 841.

(2) 11 Q. B. 402; 17 L. J. (Q.B.) 108.

(3) 7 Ex. 319; 21 L. J. (Ex.) 135.

(4) 1 H. Bl. 98.

(5) 7 T. R. 478.

(6) 6 Esp. 10.

(7) 3 C. & P. 275.

(8) 11 C. B. 675.

defendant a six months' notice to quit at Midsummer, 1873. At Midsummer the defendant refused to quit the premises: and this action of ejectment was brought.

The plaintiff insisted that the defendant's tenancy to him commenced and ended at Midsummer, and that the notice was consequently right. The defendant contended that his tenancy was one ending at Michaelmas, as his original tenancy had commenced at Michaelmas, and consequently that the notice was invalid.

It was argued on behalf of the plaintiff, that, at Midsummer, 1866, there was no tenancy of the defendant's existing which it could be said he was holding or holding over, and there was none therefore which the plaintiff could be supposed to have recognised or adopted; that the tenancy of the defendant's former lessor was then at an end; that there was then no one from whom the defendant could be said to hold; that the plaintiff did not claim through or as successor to the lessor of the defendant; and that the receipt by the plaintiff of a quarter's rent at Michaelmas, 1866, was therefore only a recognition of a tenancy commencing at Midsummer.

It was argued on behalf of the defendant, that he was originally a tenant under a lease commencing at Michaelmas; that, when the plaintiff became intermediate owner of the premises, he had an option either to turn out the defendant or to adopt the defendant's then holding; and that, by receiving rent from the defendant, he adopted the then holding of the defendant, which was a holding as upon a tenancy from year to year commencing and ending at Michaelmas.

Both sides agreed that the increase of rent at Michaelmas, 1866, did not affect the dispute.

The point to be decided seems to be this,—Is it a true proposition of law to say that, wherever one is in possession of land or premises as tenant, and his tenancy comes to an end either by efflux of time or by the death or end of title of his lessor, so that either his own lessor or the representative of his lessor, or any independent owner of the property, can without notice eject him, and the person entitled to eject him does not do so, but receives rent from him without explanation or stipulation, the person so receiving rent is to be assumed to have adopted the person so in possession as his tenant upon the terms on which that man held in the demise originally made to him?

The difficulty of affirming the proposition as a general one is, that, in some cases, as, for instance, in a case like the present, the owner is assumed to assent to the terms of a contract of which neither he nor any one through whom he claims, or for whom he is responsible, has had any knowledge. The difficulty of negativing the proposition is, that the owner does adopt the person in possession as his tenant; and, if it is not to be assumed that he adopts him as tenant on the terms on which he held, there seem to be no other terms on which he can have adopted him. If he does not in fact know the terms on which the person in possession held, should he not, unless he means to adopt those terms without inquiry, ascertain what they are? In *Roe* d. *Jordan* v. *Ward* (1), John Jordan, tenant for life, made a lease to the defendant to commence from Old Lady Day, i.e. the 5th of April, for twenty-one years. During the term, viz. on the 30th of September, 1785, John Jordan died. The defendant's lease was thereby at an end. The ownership in fee of the property passed to the son of John Jordan, as remainderman; he therefore did not take as successor to his father, but as a purchaser or stranger. There was no privity of estate between him and the defendant's original lessor. He was not in any way bound by the lease to the defendant. The defendant continued in possession, and paid rent on the same days as before, viz. on Old Lady Day and Old Michaelmas Day. Before Old Michaelmas Day, 1787, the lessor of the plaintiff gave the defendant notice to quit on the next Old Lady Day, the 5th of April, and on his refusal to quit brought ejectment. The learned judge who tried the cause left it to the jury to say whether they would not presume a new agreement that the defendant should continue to hold according to the terms of the original lease. The jury found for the defendant; that is to say, they declined to make the proposed presumption. The Court set aside the verdict. This case seems to be a considerable authority in favor of the defendant in the present case. If the objections taken on behalf of the plaintiff here were correct, they equally apply to that case, in which they were overruled. The same

(1) 1 H. Bl. 98.

decision as to a remainderman was arrived at in *Doe* d. *Collins* v. *Weller*. (1)

In *Berrey* v. *Lindley* (2) the defendant entered at Michaelmas, 1823, under a letter signed by him proposing to take the premises for five years and a half. That would end at Lady Day, 1829: but the letter could not be treated as a lease, being void as such by virtue of the Statute of Frauds. The rent was paid yearly as from Michaelmas to Michaelmas. The first point decided in the case was, that, from the entry at Michaelmas, and the payment of rent, it was to be assumed that the parties had agreed to a tenancy from year to year beginning and ending at Michaelmas, to last for five years and a half; so that the tenancy might be put an end to at any Michaelmas by six months' notice to quit, and would be at an end without notice in five years and a half. Before the end of the five years and a half there were negotiations between the plaintiff and defendant as to a lease on different terms, to commence at the end of the former lease. It was held that these negotiations did not end in a new lease. The original demise, therefore, remained in force. The defendant held on over the five years and a half, paying a higher rent, which had been proposed in the negotiations, paying it still from Michaelmas to Michaelmas. The defendant eventually gave notice to quit at Michaelmas. The plaintiff refused to recognise such notice, and brought his action for rent in the shape of an action for use and occupation. It was contended on behalf of the plaintiff that there was a new tenancy from year to year, to be inferred from the holding over, the negotiations, and the payment of rent, to commence at Lady Day, as if at the end of the former tenancy. It was contended on behalf of the defendant that the further tenancy was from year to year, but in correspondence with the commencement of the original tenancy, and therefore still from Michaelmas to Michaelmas. The Court decided in favour of the defendant, and upon this ground: "It is convenient," says Coltman, J., "not to depart from the general rule of construction in cases of tenancies from year to year; which rule is, that the time for giving notice to quit is fixed and determined by the period of the original entry." He had said before: "I think he (the defendant) must be considered as tenant

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(1) 7 T. R. 478.

(2) 3 M. & G. 498.

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with reference to the period of the original entry, unless something appears which shews that a different arrangement was come to." That seems to be an authority for saying that, where rent as from year to year is received from a person in possession of premises, without explanation or stipulation, the holding to be presumed is as of a tenancy from year to year according to the holding of the tenant, and therefore commencing at a time corresponding to that from which he originally entered or held.

In *Humphreys* v. *Franks* (1) the tenant's husband had entered at Christmas. On his death, in June, the tenant was allowed to remain on paying rent. The ownership in fee passed to a stranger, who received rent for a time, and gave notice to quit at Christmas. It was contended for the defendant that the proper inference was that she was holding as upon a June tenancy, commencing at the time of her husband's death. But the Court held otherwise. "She was allowed," says Willes, J., "to continue to hold, in consideration of paying rent, nothing being said about the commencement of her tenancy. It was, therefore, natural that it should remain a Christmas holding. It seems to me not only that there was evidence, but such evidence that the jury could not properly have found that there was any other than a holding from Christmas to Christmas."

In *Doe* d. *Buddle* v. *Lines* (2), one Taft was intermediate lessee of property. In 1832, Taft underleased to Pilcher and Carter for fourteen years and a half, to commence from the 25th of December, 1831. That lease would end on the 24th of June, 1846. Taft's interest was assigned to or otherwise came to the plaintiff. The interest of Pilcher and Carter came to the defendant. The plaintiff and defendant therefore were in the relation of landlord and tenant, the lease to end by efflux of time on the 24th of June, 1846,—the defendant's predecessor having commenced his tenancy in December. After June, 1846, the defendant held over, and paid rent to the plaintiff. The plaintiff gave notice to quit on the 24th of June, 1847. The validity of this notice was disputed, it being urged that the proper inference was that the defendant was holding as on a tenancy from year to year commencing in December, in accordance with the original entry of the defendant's

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(1) 18 C. B. 323.

(2) 11 Q. B. 402; 17 L. J. (Q.B.) 108.

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predecessor. The judgment of the Court was as follows:—"We are of opinion that the tenancy from year to year commenced at the expiration of the previous lease. This is not at variance with any of the cases. The original entry spoken of in them is, the original entry of the lessee himself. That is not so here." The Court left the verdict to stand for the plaintiff, refusing a rule to shew cause why it should not be entered for the defendant. This case, therefore, only indicates that the rule enunciated in former cases,—which cases, it says, are not at variance with it,—is only applicable to the entry of the lessee himself who holds over, and not to the entry of his predecessor through whom he held his lease.

Where the question arises with a lessee who is holding over the expiration of a lease originally granted or a demise originally made to himself, the rule does apply. That is the present case. The present defendant held over the expiration of the lease granted to himself, which lease commenced at Michaelmas. The inference, as between him and the plaintiff, who allowed him to hold over, and who received rent as from year to year from him without explanation or stipulation, is, that there was a tacit agreement that the defendant should hold as tenant from year to year according to his former holding,—that is to say, as from Michaelmas to Michaelmas.

The notice to quit at Midsummer was therefore wrong, and the rule to enter a nonsuit must be made absolute.

DENMAN, J. I agree, but with so much doubt, that, if this were not ejectment, I should withdraw the restriction upon leave to appeal. But, under the circumstances, I think we ought simply to enter a verdict for the defendant.

Rule absolute.

Attorney for plaintiff: *J. F. Holcombe.*
Attorney for defendant: *S. Cotton.*

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June 12.

HILLS AND ANOTHER *v.* WATES AND ANOTHER.

Interrogatories—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), s. 51—*Plea of Payment to Plaintiff's Testator.*

In an action by executors against the makers of a promissory note given to the testator, the defendants pleaded, as to part of the claim, payment to the testator in his lifetime:—

Held, upon the authority of *Hawkins* v. *Carr* (Law Rep. 1 Q. B. 89), that the plaintiffs might interrogate the defendants as to the time and place at which and the circumstances under which the alleged payment took place.

This action was brought by the plaintiffs as executors of the last will of Jane Eliza Wates, widow of Edward Wates, to recover the amount appearing to be due to the estate of the testator upon a joint and several promissory note of the defendants.

The defendants pleaded payment as to part of the claim, and payment into Court as to the residue.

Upon an affidavit by the plaintiffs, that they believed they would derive material benefit in this cause from the discovery they sought by the interrogatories which they required to be delivered therein; that they had no means of discovering whether anything was paid in the lifetime of Edward Wates on account of the promissory note, except by interrogating the defendants; and that they believed they had a good cause of action on the merits,—a summons was taken out before Denman, J., at Chambers, for leave to administer to the defendants the following interrogatories:—

1. Have you or either of you ever paid any, and, if any, what sum of money in part payment of the bill which is the subject-matter of this action? If so, state to whom the said sum was paid, and where; and state whether the said sum was paid by one or both of you, or by any other person. If by one only, state by which of you; and, if by any other person, state the name and address of such person.

2. State in what manner the said sum was paid,—whether in notes or cash or by cheque.

3. If by cheque, state upon what bank the said cheque was drawn and by whom the said cheque was signed.

4. Did you or either of you, or any other person authorized by you, receive from the said Edward Wates, or from any other person authorized by him, either at the time of the payment of the said sum of money or at any other time, any receipt or other note or memorandum in writing relating to the payment of the said sum?

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5. Have you or either of you ever at any time whatsoever had any other transaction relating to any bill or promissory note with the said E. Wates?

6. Have you or either of you in your possession, custody, or power, or in the possession, custody, or power of your or some or one and which of your attorneys or attorney, agents or agent, divers or some and what accounts, books of account, receipts, memoranda, letters, copies of or extracts from letters, and other papers and writings, or some and what accounts, books of account, receipt, memorandum, letter, copy of or extract from a letter, and other paper and writing relating to the payment of the said sum of money? Set forth a full and particular list and schedule thereof, distinguishing which of the same are in your or their or his possession or power, and where and in whose possession the other of them are.

The attention of the learned judge was called to two cases of *Hawkins* v. *Carr* and *Parsons* v. *Carr* (1); but he considered them not to be in point, and refused an order.

Powles on a former day moved for a rule by way of appeal from the decision of the judge, relying upon the case above referred to, and also upon the general practice as laid down in Ch. Archb. 11th ed. p. 1418: "A plaintiff in equity is entitled to discovery for the purpose of repelling the case which he anticipates will be set up by the defendant." (2)

[BRETT, J. You are, in effect, asking the defendants to swear to the truth of their plea. If you put it on the ground that an executor may be allowed to administer interrogatories which would not be allowed in the case of any other person, where is the authority for it?]

Mr. Justice Lush is said to have acted upon that notion at Chambers: and Mr. Justice Keating at Chambers, upon the authority of *Hawkins* v. *Carr* (1), allowed interrogatories on the ground that the payment sought to be proved had been made to a bankrupt who had absconded. An executor cannot be expected to be prepared with evidence at the trial to rebut a case of payment to the testator.

A rule nisi having been granted, with an intimation that inquiry should be made as to whether a difference was made in discovery in equity between the case of an executor and that of another person,

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(1) Law Rep. 1 Q. B. 89. 12 Jur. N.S. 334.

(2) Citing *Attorney General* v. *Corporation of London*, 2 Mac. & G. 247; 19 L. J. (Ch.) 314.

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Paterson shewed cause. The general principle of equity is, that a plaintiff is only entitled to discovery as to matters tending to establish his own case, or which may be common to both his own case and that of his opponent; but it does not extend to a discovery of the manner in which the defendant's case is to be exclusively established. Interrogatories to shew how the defendant means to prove his plea of payment are never allowed; and the circumstance of the plaintiffs suing as executors can make no difference. *Hawkins* v. *Carr* (1) was an action for goods sold, money lent to, and on accounts stated with, the defendant by them and their late partner; and the defendant pleaded a complicated plea shewing how the account was stated, and how certain unliquidated and disputed claims were adjusted and settled between the defendant and the deceased partner; and then the plea went on to shew payment of a part of such ascertained debt and a bill given for the rest, which bill was still outstanding. The greater part of the matters alleged in the plea were common to both parties. Although the Court took time to consider, the judgment is very short, and no reasons are given. The case of an executor has never yet been held to be an exception.

Powles, in support of the rule. The means of proof of the alleged payment being exclusively in the knowledge of the defendants, there can be no good reason why the proposed interrogatories should not be allowed. The case falls precisely within the principle upon which the Court of Queen's Bench proceeded in *Hawkins* v. *Carr.* (1) The books furnish no authorities in equity on the subject.

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. Without laying down any rule as to executors, it is enough to say that the matters upon which the plaintiffs seek to interrogate the defendants are so essential to the maintenance of their case, and so exclusively within the knowledge of the defendants, that I think the interrogatories ought to be allowed. We have it upon the highest authority that the case of a deceased partner is not within the ordinary rule as to interrogatories. The

(1) Law Rep. 1 Q. B. 89. 12 Jur NS 334

judgment in the case I allude to is certainly very short. The Court say (1): "We had doubts whether the interrogatories were such as were contemplated by the statute or consistent with the practice in Chancery, and we took time to consider, in order to ascertain this latter point and to consult the other judges in the matter. We have now done so, and we understand that in a case of this particular nature the interrogatories would be allowed; and therefore, as we are by no means desirous to curtail the powers conferred upon the Courts of Law by the Common Law Procedure Act, 1854, we think that the interrogatories ought to be allowed." It would have certainly been more satisfactory if the Court had given reasons. Nevertheless, the case comes to us with the very highest sanction; and the only peculiarity in it being that the alleged statement and adjustment of the claims was made with a deceased partner, we must assume that that was the foundation of the judgment. I am unable, therefore, to see that the circumstances of this case do not fall within the only fact which could be of any importance in that case. Here, the plea alleges a payment to a deceased person; and the circumstances under which the alleged payment was made are wholly without the knowledge of the plaintiffs, and are exclusively within the knowledge of the defendants. I see no reason why in good sense and justice we should not adopt the decision of the Court of Queen's Bench in a case so closely analogous.

KEATING, J. I do not understand the Court as intending to interfere in any degree with the general rule that a defendant cannot be interrogated as to any matters which exclusively constitute or relate to his defence. But it is said that that general rule is subject to this exception, that, where the claim is made by the representatives of a deceased person, and the defence set up consists of transactions said to have taken place with that person, it is not unreasonable that the defendant should be interrogated as to the circumstances under which those transactions took place. In *Hawkins* v. *Carr* (2) the plea alleged an adjustment of accounts with a deceased partner of the plaintiffs, resulting in what amounted to a quasi payment of the ascertained balance, and a discharge by the deceased partner: and the Court thought it right that the defendant should be interrogated. That was a decision come to by the Court of Queen's Bench after consulting the judges of the other Courts. It may be said, therefore, to be a decision of Westminster Hall. The Court seem to have thought that the fact that the account was stated with the deceased partner was material. In that view the present case clearly comes within it. The object of the interrogatories in both cases is the same, viz. to ascertain the circumstances under which the alleged payment was made. I agree with my Lord that the rule should be made absolute.

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(1) Law Rep. 1 Q. B. at p. 93. 12 Jur. N. S. 336

(2) Law Rep. 1 Q. B. 89. 12 Jur. N. S. 334

GROVE, J. I am of the same opinion. If we were to adopt Mr. Paterson's argument, we must suppose there was no case for the consideration of the Court of Queen's Bench in *Hawkins* v. *Carr.* (1) I think it is a distinct authority in favor of the allowance of these interrogatories. Primâ facie, a bill or note which is not given up to the acceptor or maker is still unpaid. Unless these interrogatories were allowed, the plaintiffs would have no means whatever of meeting the case set up by the defendants.

Rule absolute.

Attorneys for plaintiffs: *Hooke & Street.*
Attorneys for defendants: *Stevens, Wilkinson, & Harries.*

June 16.

[IN THE EXCHEQUER CHAMBER.]

THE CITY DISCOUNT COMPANY, LIMITED, *v.* McLEAN.

Appropriation of Payments—Secured Debts—Accounts rendered—Liability of Surety.

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The presumption, that, where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation, may be rebutted by circumstances of the case shewing that such could not have been the intention of the parties.

The plaintiffs, a discount company, were in the habit of discounting bills for S. In consideration that the plaintiffs would advance money to a certain amount to S. on the deposit of a lease of S.'s premises, the defendant guaranteed any part of the money so advanced that might remain due after the realisation of the leasehold security, the guarantee to last for a period not exceeding two years. Advances were made to S. by the plaintiffs in accordance with the guarantee, and a great number of other transactions by way of further advance upon the discount of bills by the plaintiffs for S. took place in the usual course of business between them. Within two years from the date of the guarantee, S. failed, owing to the plaintiffs an amount exceeding the sum guaranteed. A long debtor and creditor account was kept by the plaintiffs of their transactions with S. during such time, including the advances made under the guarantee. The aggregate of the items on both sides of the account very largely exceeded the amount of the sum guaranteed. In this account the practice was to credit S. with the amount of the bills discounted, less discount and commission, and debit him with the amount of the bills if they were dishonoured. Many of the bills discounted were renewed at maturity, and the same system of crediting and debiting applied to the renewals. The account was balanced on several occasions before S. failed, and shewed balances against S. of much less amount than the sums advanced under the guarantee, but these balances were arrived at by crediting S. with the amount of outstanding bills, many of which were not paid at maturity, and were included in the ultimate balance against S. Bills were discounted with the plaintiffs by S. to cover advances made under the guarantee, and were from time to time renewed but never were paid. Bills, discounted by S. with the plaintiffs after the advances under the guarantee, had been paid to an amount exceeding the sum guaranteed, but it did not appear that in point of fact the balance really due from S. to the plaintiffs after the date of the guarantee was ever less than the sum guarauteed. In an action on the guarantee to recover the moneys advanced under it:—

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(1) Law Rep. 1 Q. B. 89. 12 Jur N.S. 334

Held, that, under the circumstances of the case, it could not have been the intention of the plaintiffs and S., by the mode in which the account between them was kept, that the advance under the guarantee should be considered as satisfied by the items of credit therein, and consequently that the action was maintainable.

Henniker v. *Wigg* (4 Q. B. 792) followed.

ERROR from the judgment of the Court of Common Pleas in favour of the plaintiffs upon a special case stated by order of nisi prius, of which the facts were in substance as follows:—

The plaintiffs were a company whose chief business was discounting bills. The action was brought to recover £750, being the sixth part of the sum of 5000*l*., after deducting from that sum the moneys realised from the sale of certain leasehold premises, which sum of 750*l*. was alleged to be due from the defendant under a guarantee given by him and five other persons to the plaintiffs under the following circumstances:—

Between November, 1865, and May, 1867, the plaintiffs had discounted in the way of their business certain bills for a Mr. Henry Southgate, who carried on business as Southgate & Co., and at the time when the guarantee was entered into he was indebted to the plaintiffs in discount transactions about 208*l.* He was also indebted to plaintiffs to the extent of 1660*l.* on discount transactions previous to November, 1865, and both these two amounts were afterwards added to his debt to the plaintiffs of 27,704*l.* aftermentioned. Southgate carried on business as an auctioneer of pictures, &c., and the bills discounted by him up to the 3rd of May, 1867, the date of the guarantee, were all connected with his business. In May, 1867, he was desirous of obtaining an advance of 5000*l.* for reasons which then pressed him, one of the principal being a debt by him of 2914*l.* to Messrs. Ward, Lock, & Tyler, and he at first offered by way of security to the plaintiffs to deposit with them the lease of his premises. Further security was required, and the following guarantee was given and signed by six persons, one of them being the defendant:—

"To the City Discount Company, Limited.

"Gentlemen,—You having agreed to advance Messrs. H. Southgate & Co. a sum not exceeding 5000*l.* on the deposit of their lease of the premises, No. 143, Strand, in the county of Middlesex, and certain life policies not included in this undertaking, we hereby undertake and agree to guarantee and indemnify you to the extent of 800*l.* each, or to the extent of a sixth part of any deficiency of the said advance that may remain due to you after sale of the said lease; this undertaking being given on the understanding that the said lease shall be sold and the purchase-money realised before we are severally called upon for the deficiency (if any), and that this guarantee shall last for a period not exceeding two years from this date. Dated the 3rd of May, 1867."

A mortgage of the lease was also given by Southgate as a security for the advance.

After the 3rd of May, 1867, and between that date and December, 1868, when Southgate stopped payment, and was indebted to the plaintiffs on the balance of accounts in a sum of 27,704*l.*, the company, in various sums at different times, advanced to Southgate money amounting in the whole to the sum of 44,784*l.*, Southgate being on several occasions during that period indebted to the plaintiffs in respect of advances made by them to him in a sum exceeding 5000*l.*; a large portion of this debt of 27,704*l.* was made up

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of returned and renewed bills, and discounts, and commissions. During the same period, from the 3rd of May, 1867, to December, 1868, Southgate discounted with the plaintiffs trade bills amounting in the whole to the sum of 40,326*l.* 5*s.*, he being at the date of such discount credited in the books of the plaintiffs with the amount of such bills, less interest and commission, and if such bills were paid at maturity to the plaintiffs by the acceptors such credit remained, but if they were dishonoured he was debited with the full amount of such bills.

After the 3rd of May, 1867, another class of bills were also discounted by Southgate with the plaintiffs. These were bills which he drew, and which were accepted for his accommodation, and were then discounted by him with the plaintiffs, who guaranteed the acceptors against all liabilities in respect of the same, and who credited Southgate at the time of the discount with the amount of the said bills, less interest and commission; and when the same became due, and as a matter of course were unpaid either by Southgate or the acceptors, debited Southgate with the full amount of the same. When the trade bills before mentioned, and the the last-mentioned class of bills, arrived or were about to arrive at maturity, Southgate took to the plaintiffs other bills to something like the same amount, either trade bills or bills of the last-mentioned class, and discounted them with the plaintiffs, and the same mode of crediting and debiting him was pursued as before mentioned in respect of the two classes of bills respectively; and this mode of dealing continued till the time of Southgate's bankruptcy. Southgate took the accommodation bills to plaintiffs at the request of their manager to keep the company out of cash advances, they re-discounting the bills Southgate had discounted with them, and the gross amount of such bills was about 14,000*l.* Both classes of bills were brought as above by Southgate to the plaintiffs in order to keep the company out of cash advances, and were brought from time to time, having regard to the amount of such advances, though not exactly corresponding with such amounts, or with the times when the said advances were made.

The advances made were made from time to time, and extended over the whole period from the 3rd of May, 1867, to December, 1868. The case then set out the dates and amounts of various advances made on the 8th of May, 1867, and immediately subsequent days, which were contended by the plaintiffs to be advances made under the guarantee. (1)

About the time of these advances accommodation bills of the character before adverted to were discounted by Southgate with the company in order to cover these advances, which said bills were from time to time renewed according to the mode before mentioned with respect to this class of bills, and have never been paid, and on all advances made to Southgate by plaintiffs bills of one sort or another were brought by Southgate to plaintiffs to be discounted by them, with the object of keeping them out of cash advances. Between the 3rd of May, 1867, and December, 1868, considerably more than 5000*l.* of the trade bills had been paid. More than 5000*l.* was advanced by the plaintiffs to Southgate between the 3rd of May, 1867, and the 4th of September, 1867, and more than 5000*l.* between the 24th of September, 1867, and December, 1868. It appeared from the books of the plaintiffs that from May, 1867, to December, 1868, the accounts were made up and shewed only a small balance against Southgate, e.g. at the end of 1867 one of 273*l.*, and at the end of June, 1868, one of 1060*l.* odd, but at the time of his bankruptcy in December, 1868, the accounts shewed a balance against him of 27,704*l.* The plaintiffs in June, 1869, exercised the power of sale in the mortgage, and the premises were sold on the 25th of February, 1869. The action was brought to recover 750*l.*, being the sixth part of 4500*l.*, the deficiency out of 5000*l.* after the sale.

The case contained the following statements as to the course of business between the plaintiffs and Southgate. The plaintiffs' mode of keeping accounts was this, not only with regard to Southgate & Co., but all their customers. The amount of discount and commission was arranged and deducted from the nominal amount of the bills. The transaction was entered in the day-book. If the total amount of the balance was then and there received and taken away by the customer, the transaction was frequently not entered in the ledger at all. If part only was taken then the amount left and not then received was entered to his credit in the ledger, and when that amount was afterwards taken up by the customer and was paid to him, the amount was then debited to him in the books. If the balance, after deducting discount and commission, was not then taken up, the whole amount of the balance was credited to the customer in the ledger, and when the customer received the advance, which was usually within a day or two, the amounts so paid and received were entered in the ledger. If the discounted bills were not paid on maturity by the acceptor or the customer, and were paid by the plaintiffs, the amount was debited to the customer as before described. Sometimes the customer came to the manager and told him that he intended to bring bills for discount and requested an advance by anticipation. This advance was then debited to him in the ledger, and when the bills were brought he was credited with their nominal amount, less the interest and commission, as abovementioned.

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(1) It was admitted by the counsel for the plaintiffs during the argument that a certain portion of the sums advanced under the guarantee, and in respect of which the action was brought, must be taken upon the face of the accounts between the plaintiffs and Southgate to have been satisfied by specific payments. The plaintiffs' claim was, therefore, confined in argument to the residue of the advances, i.e. such portion of the advances as remained unpaid unless, by the application of the doctrine of appropriation of payments, as contended by the defendant, it was to be considered as satisfied; the statement of the case above has therefore been, as far as possible, confined to the facts connected with such last-mentioned advances.

The balances before mentioned as appearing against Southgate from the books of the plaintiffs when the accounts were made up, were arrived at by taking into account the sums on the credit side, which represented the amount of the bills, less interest and commission for discount, which were current at the date of the balance being struck, and of promissory notes of Southgate, some of which bills and notes were not paid at maturity, and were included in the ultimate balance of 27,704*l.* against Southgate. The plaintiffs from time to time sent to Southgate accounts which were copies of their ledger, which thus shewed the above balances. (1)

The Court were to draw inferences of fact.

The question for the Court was, whether the defendant was liable to pay the sum of 750*l.*, or any part thereof.

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(1) The case also contained long extracts from the accounts between the plaintiffs and Southgate which it is impossible to set out.

J. Brown, Q.C. (with him *Thrupp*), for the defendant, contended that the plaintiffs having included the transaction as to the 5000*l.* with the rest of the transactions between themselves and Southgate, could not now separate them, and therefore that the earlier credits must be applied to the earlier debits, and accounts having been rendered by the plaintiffs to Southgate, settled on this principle, in which the earlier items were treated as settled, the 5000*l.* must be treated as paid.

He cited *Clayton's Case* (1); *Bodenham* v. *Purchas* (2); *Simson* v. *Ingham* (3); *Henniker* v. *Wigg* (4); *Laing* v. *Campbell.* (5)

F. M. White (with him *English Harrison*), for the plaintiffs, was not called upon.

BRAMWELL, B. I am of opinion that the judgment should be affirmed to the extent that the plaintiffs' counsel now contends for. This is admitted not to be a continuing guarantee, and a certain amount of the claim has been given up. With respect to the remainder, the question is whether that amount is to be considered as discharged. It seems to me that that question must be determined as if it arose between Southgate and the plaintiffs, and the question therefore is whether Southgate would be entitled to say that the earlier items of credit in this account must be applied to the earlier items of debit, so that the latter are to be considered as settled and extinguished. I am strongly of opinion that he would not be so entitled. I quite agree with the principle of the cases cited, such as *Clayton's Case* (1) and *Bodenham* v. *Purchas* (2); and I think we ought to follow them when applicable. In those cases there had been a change of parties, and the account was apparently continued as if no alteration had happened; and it was, under the circumstances of those cases, reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit. But we must decide every case according to its own circumstances, and it seems to me impossible under the circumstances of the present case to hold that the items of credit must be appropriated to the items of debit in order of date, so as to extinguish the

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(1) 1 Mer. 608.
(2) 2 B. & Ald. 39.
(3) 2 B. & C. 65.
(4) 4 Q. B. 792.
(5) 36 Beav. 3.

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earlier items of debit. For instance, premises being mortgaged to secure the advances made under the guarantee, would Southgate have been at liberty to go to the plaintiffs, and insist on a return of the security on the ground that the debt was extinguished? That would be to hold something absurdly contrary to what may be presumed to have been in the contemplation of the parties. They contemplated an advance of 5000*l*., and that the debt might continue for two years unpaid and unsatisfied; and they obviously contemplated subsequent dealings quite independent of and unconnected with the advance of 5000*l*. If this were not so, the guarantee was really inoperative. It was not wanted with respect to the ordinary case of discounts of bills in the course of current business between the plaintiffs and Southgate. What was wanted here was a particular advance independently of their ordinary discount transactions, not merely an ordinary advance upon discount of bills. The matter would have been abundantly plain if they had thought fit to keep their books in a different way, which, for business purposes, would have been very inconvenient, viz. by debiting the advances in the first instance, and not giving credit for the bills, but keeping a separate account as to them. It is manifest that then the advance on the credit of the guarantee would have been unaffected by the subsequent transactions. It could not be suggested that it was diminished or paid off by what took place with regard to the accommodation bills, or even by the trade bills. But no banking-house or discount company, having transactions such as these with a customer, in practice keeps the account so. For convenience sake they keep it in such a manner as to see at any time the state of the balance, assuming that all outstanding securities are realised. It is only because it is so kept that there is any possibility of argument on such a question as this. With respect to the accommodation bills it is clear that they were nothing more than advances or renewals of advances. With respect to the trade bills discounted after the advances, they were discounted on the terms that Southgate should have the proceeds, and not that the proceeds should be applied in liquidation of the 5000*l*. That appears from the statement that when the sums drawn exactly corresponded to the amount of the bill minus the discount and commission, no entry of it was made in the ledger at all; and when it did not equal the amount of the bill it appeared in the ledger, because, instead of keeping a separate account, it was more convenient to include all these transactions in one account. When we find that the real transaction between the parties was that the proceeds of those bills were to be handed over to Southgate, and not to be applied to the original loan of 5000*l.*, it is impossible to hold that mere book-keeping arrangements can alter what, from the substance of the transactions, must clearly have been the intention of the parties.

Blackburn, J. I agree that the judgment of the Court below should be affirmed, subject to its being reduced by the amount given up by the plaintiffs' counsel. We must assume that the construction of the guarantee is that it was not a continuing guarantee for the balance that might be due, during the two years, up to 5000*l.*, but of advances to the amount of 5000*l.* I understand the fact to be that 5000*l.* was advanced, and if that amount has not been paid off the plaintiffs are entitled to recover the sixth part of so much of the amount as has not been actually satisfied, which amounts to about 550*l.* It is contended, however, on the part of the defendant, that the whole 5000*l.* has been paid off in this way, viz. that in the account it appears that, after the advance was made, payments were made by Southgate greatly exceeding 5000*l.*, and half-yearly accounts were rendered from time to time shewing this to be so; and it is urged that by operation of law, or as an inference of fact which we are bound to draw, the 5000*l.* has been satisfied. I cannot come to that conclusion. It has been considered a general rule since *Clayton's Case* (1), that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly. If the debtor does not appropriate it, the creditor has a right to do so to any debt he pleases, and that not only at the instant of payment, but up to the very last moment, as was decided in *Mills* v. *Fowkes* (2), following a previous case of *Simson* v. *Ingham*. (3) We have, therefore to consider whether this right of the creditor has in the present case been so exercised or barred. It may be, as a general rule in

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(1) 1 Mer. 608.

(2) 5 Bing. N. C. 455.

(3) 2 B. & C. 65.

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ordinary cases, and if there is nothing to show a contrary intention, the items of credit must be appropriated to the items of debit in order of date, and that the half-yearly account rendered would constitute a fresh point of departure. *Clayton's Case* (1) and other similar cases shew that when a partner dies and there is a change of the partnership, and the transactions with the new and old firms are all mixed up together in one account, the law treats the whole as one entire account, and applies the items of credit to those of debit according to date, in favour of the estate of the deceased partner. But when the parties remain the same, the question is whether the rendering of the account amounts to an appropriation of the items to one another in order of date. In such a case as this, where the earlier items constituting the 5000*l.* were secured by a mortgage and a guarantee, it never could have been the intention that they should be so appropriated. But it is contended that as a matter of law, though there is no authority so deciding, or as an inference of facts, though it is contrary to all probability, we are bound to hold that the 5000*l.* is to be considered as paid off; and if so paid off, it follows that it must be treated as paid off in six months, though by the terms of the guarantee a period of two years was contemplated. I cannot draw such an inference, either as matter of law or of fact. The true rule is that laid down in *Henniker* v. *Wigg* (2), which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary. Lord Denman, C.J., referring to the rule in *Clayton's Case* (3), there says, "It is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case." That judgment seems to me to be sound sense.

Here the surety had nothing to do with the accounts. Southgate executed a mortgage and procured a guarantee to last for two years. Is it not obvious that it was meant that the 5000*l.* was not to be considered as paid off out of the first amounts credited to Southgate in the course of the subsequent discount transactions, but was to stand over and be treated independently of such transactions? If so, this rebuts any presumption arising from the state of the

(1) 1 Mer. 608.
(2) 4 Q. B. 792.
(3) 1 Mer. 530.

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accounts. It does not appear that in point of fact the balance due was ever less than 5000*l.* after the advance.

MELLOR, J., concurred.

CLEASBY, B. I am of the same opinion. In many cases, no doubt, the rendering of an account may be an appropriation of the items to one another in order of date; but there are strong reasons why it should not be so considered here. With regard to the accommodation bills the amounts of which were credited to Southgate, which credit it was contended must be applied to the 5000*l.* advances, they were, it appears, never intended to be paid by Southgate at maturity. How could such a transaction be intended to operate as satisfaction of earlier items? The same remark applies to the trade bills, for the proceeds of the discount of them were not to be in fact applied in satisfaction of the earlier items, but handed to Southgate. The mode of entering these financial transactions in the account could not alter their real character and make them operate as a satisfaction of the previous advances.

ARCHIBALD, J., and AMPHLETT, B., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Mercer & Mercer.*
Attorneys for defendant: *Booth & Lowe.*

May 29.

IN RE TAUNTON ELECTION PETITION.

MARSHALL AND ANOTHER, PETITIONERS; SIR HENRY JAMES, RESPONDENT.

Parliament—Election Petition—Effect of Decision on a Petition pronounced and certified before, but not reaching the Speaker until after, Dissolution—Costs—Parliamentary Elections Act, 1868 (31 *&* 32 *Vict. c.* 125), *ss.* 4, 11 (*subs.* 13), 13, 37, *and* 41.

A petition against the return of the member for Taunton was filed in November, 1873. The trial commenced on the 12th of January, 1874, and on the morning of the 26th, at about 10.30, the judge gave judgment declaring the respondent to have been duly elected, and ordering the petitioners to pay the respondent's costs. This decision was indorsed on the petition, and before noon the judge signed a certificate and report of his determination, and caused them to be posted addressed to the Speaker of the House of Commons. On the same day, after this had been done, but before the certificate and report actually reached the hands of the Speaker, parliament was dissolved by royal proclamation. The certificate and report of the judge were communicated by the Speaker to the new House on its first meeting, and were ordered to be entered on the journals :—

Held, that the dissolution of parliament after the decision was pronounced and the certificate signed by the judge and put in transit to the Speaker, though before the certificate actually reached the Speaker's hands, did not affect the right of the respondent to have his costs taxed.

THIS was a rule calling upon the respondent to shew cause why the taxation of costs on this petition, and all proceedings incident thereto, should not be stayed, and why the taxation (if any) should not be set aside.

The facts, as they appeared from the affidavits on both sides, and from the statement of Grove, J., who presided at the trial of the petition, were as follows:—Sir Henry James, Q.C., having been returned as duly elected at the last election for the borough of Taunton, Marshall and another in November, 1873, presented a petition complaining of bribery, treating, &c. This petition came on to be tried before Grove, J., on the 12th of January, 1874, and several following days. On the 26th of January, at about half-past ten in the morning, the learned judge pronounced an oral judgment dismissing the petition; and he caused the following indorsement to be made on the petition:—

"The Parliamentary Elections Act, 1868.

"At a Court holden at the Shire Hall, Taunton, in the county of Somerset, on Monday the 12th of January, 1874, and several days afterwards, before the Hon. Sir William Robert Grove, Knt., the within petition came on to be tried, and the petitioners and respondent, by their counsel and attorneys, severally appeared; and, upon hearing counsel on both sides, and the evidence adduced by and on behalf of the respective parties, the said Sir William Robert Grove, at the conclusion of the said trial, determined as follows,—First, that the said Henry James was duly elected and returned,—Secondly, that the petitioners do and shall pay to the respondents their costs, charges, and expenses, to be taxed in the prescribed manner."

The learned judge on the same day duly certified his determination to the Speaker of the House of Commons, in accordance with s. 11, subs. 13, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), and made his report negativing the existence of corrupt practices at the said election. This certificate was duly addressed to the Speaker and posted at Taunton before twelve o'clock at noon of the 26th of January, 1874, and was received by the Speaker some time in the evening of that day.

The then parliament was dissolved by royal proclamation on the 26th of January, 1874; and on the 19th of March, on which day the new parliament met for the first time for the dispatch of business, the Speaker communicated to the House the fact that he had received such certificate and report, as appears by the following entry of that date in the Journals of the House:—

"Mr. Speaker informed the House that he had received from Mr. Justice Grove, one of the judges selected for the trial of election petitions pursuant to the Parliamentary Elections Act, 1868, a certificate and report relating to the election for the borough of Taunton.

"Mr. Speaker also informed the House that the said certificate having been given and the report made before the dissolution of the late parliament, were not received by him until after such dissolution; but he thought it right that the same should be laid before the House.

"And the same was read as followeth" [setting it out] "and ordered to be entered on the Journals of the House."

Giffard, Q.C., and *R. S. Wright*, shewed cause. The material facts are that the petition was filed in November, 1873; that the trial commenced on the 12th of January, 1874, and came to an end on the 26th, on the morning of which day the decision of the judge dismissing the petition with costs was pronounced, indorsed on the petition, and certified to the Speaker, that is, put in course of transit properly addressed to him; that the parliament was dissolved at some uncertain time on the same day; that the certificate of the judge did not actually come to the Speaker's hands until some hours after the dissolution; and that the certificate and report of the judge were communicated to the new parliament and ordered to be entered on the Journals of the House on the 19th of March. The question is whether, under these circumstances, the dissolution of parliament so put an end to the petition and the proceedings subsequent thereto that the costs so ordered to be paid could not be taxed and enforced.

The only sections of the Parliamentary Elections Act, 1868, which seem to have any material bearing upon this question are the 2nd, the 4th, the 11th (subs. 13), the 13th, the 37th, and the 41st. Sect. 2 enacts that "the expression 'the Court' shall, for the purposes of this Act, in its application to England, mean the Court of Common Pleas at Westminster; and that such Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority, with reference to an election petition and the proceedings thereon, as it would have if such petition were an ordinary cause within their jurisdiction." Sect. 4 enacts that, "for the purposes of this Act, 'Speaker' shall be deemed to include deputy speaker; and, when the office of Speaker is vacant, the clerk of the House of Commons, or any other officer for the time being performing the duties of the clerk of the House of Commons, shall be deemed to be substituted for and to be included in the expression 'the Speaker.'" Sect. 11, subs. 13, which is the important provision, is as follows:—"At the conclusion of the trial, the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes." Sect. 13 enacts that "the House of Commons, on being informed by the Speaker of such certificate and report or reports, if any, shall order the same to be entered in their journals, and shall give the necessary directions for confirming or altering the return, or for issuing a writ for a new election, or for carrying the determination into execution, as circumstances may require." Sect. 37 provides that "an election petition under this Act shall be abated by the death of a sole petitioner or of the survivor of several petitioners;" and that "the abatement of a petition shall not affect the liability of the petitioner to the pay-

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ment of costs previously incurred." And s. 41 enacts that all costs, charges, and expenses of and incidental to the presentation of a petition and to the proceedings consequent thereon, shall be defrayed by the parties to the petition in such manner and in such proportions as the Court or judge may determine; and may be taxed according to the same principles as costs between attorney and client are taxed in a suit in Chancery, and may be recovered in the same manner as the costs of an action at law.

The ground of the present motion is, that the determination of the judge upon this petition not having been certified to the Speaker, that is, not having actually reached the hands of the Speaker, until after the dissolution of parliament, the order for costs was without jurisdiction. The dissolution of the late parliament can have no effect upon the question now before the Court. The mode of carrying out the judgment on the petition is by certificate to the Speaker. The jurisdiction over the costs is vested in the judge or the Court; and that jurisdiction is not affected by a dissolution. The House of Commons has no interest in or control over the costs. In the Exeter Case, *Carter* v. *Mills* (1), the word "abatement" is inadvertently used with reference to the dissolution of parliament: but in strictness it is wholly inapplicable. The sole object of the motion in that case was to get back the deposit, the petition having come to an end before any steps had been taken to bring it to trial. The old practice of election committees on this subject is perfectly intelligible. The committee had to report to the House; and it ceased to exist the moment parliament was dissolved, though its powers were only suspended upon a prorogation.

[LORD COLERIDGE, C.J. If an election committee before a dissolution reported to the House that corrupt practices prevailed at the election, the new parliament would take up the proceedings.]

Under the Act of 1868, costs may be recovered even though the petition has abated. All judicial proceedings are presumed to take place at the earliest moment of the day: *Wright* v. *Mills* (2), citing *Shelley's Case.* (3) Upon reference to the Journals of the House of Commons, many instances will be found of parliament having sat and transacted business on the very day of dissolution or prorogation. Judgments have been delivered, bills have been amended and the royal assent has been given on the same day as the dissolution. (1)

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(1) Ante, p. 117.

(2) 4 H. & N. 488; 28 L. J. (Ex.) 223.

(3) 1 Rep. 93 a.

(2) S.C. 5 Jur. N.S. 771

[LORD COLERIDGE, C.J. On the 22nd of April, 1831, William IV. dissolved parliament in the very midst of a debate.]

In the now existing parliament the judgment upon this petition is adopted and treated as a subsisting and valid judgment. All had been done by the judge to give validity and finality to it before the dissolution took place. What occurred afterwards cannot be held to invalidate it. Formerly the Speaker had authority to certify for costs. (2) In *Strachey* v. *Turley* (3), it was sought to limit that power to the Speaker for the time being. There, an election committee had reported to the House of Commons that two several petitions against the return of members for East Grinstead were frivolous and vexatious, whereupon the Speaker had referred the costs on both petitions to be taxed jointly, and had granted a certificate of the amount of such joint taxation, and afterwards another amended certificate, referring to the former, and apportioning the costs incurred in opposing each petition separately as well as jointly; and it was held that, both certificates being invalid by reason that the Act only authorized the costs to be taxed separately on each petition (4), a new certificate ascertaining the separate costs incurred on each petition might be granted by the Speaker of a new parliament,—the Act mentioning "the Speaker" generally. Lord Ellenborough there says (5): "Suppose the Speaker had died after the report of the committee, and before such a direction to the taxing officers could have been made,—or, suppose, after such direction, the particular officers charged with the taxation had died,—can it be contended that the succeeding Speaker in the one case could not have directed the costs to be taxed; or, in the other, that the same Speaker would have had no power to direct the taxation to be made by other officers in the place of those who had died? Such a construction would have been most manifestly against the sense of the Act, and yet the argument would still apply that the authority was only given to the same Speaker." And Bayley, J., says (1): "This is a remedial legislative provision. The Act mentions the Speaker generally; and, though it do not add *for the time being*, yet, if such a construction be necessary to advance the remedy, we must so construe the general words. No injustice can ensue from such a construction: but great injustice would ensue from a narrower one; for, immediately after a report made of a frivolous and vexatious petition, parliament might be dissolved before any taxation could be made, of which I remember an instance; and then, if the Speaker in the next parliament could not direct the taxation and grant a certificate, the remedy would altogether fail." In *Ex parte Stockbridge Railway Bill* (2), an order was made for the return of a parliamentary deposit on the withdrawal of a railway bill, under 9 & 10 Vict. c. 20, s. 5, upon production of a certificate signed by the deputy Speaker of the House of Commons, in the absence (from illness) of the Speaker.

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(1) See the Journals of June 10, 1818, June 17, 1837, July 3, 1847, August 20, 1852, March 21, 1857, August 2, 1858, July 6, 1865.

(2) 28 Geo. 3, c. 52, s. 22.

(3) 11 East, 194.

(4) 7 East, 507.

(5) 11 East, at p. 201.

The judge's certificate under this Act is given when he has signed it and put it in the course of transit to the Speaker. This is not like the case which was before the Court last term, *Hurdle* v. *Waring* (3), where the question was whether the return of a writ of election was made to the clerk of the Crown in Chancery before it had actually reached his hands. The Court held that the return was not *made* until it had come to the hands of the person who was to act upon it. It is enough to say that that decision proceeded upon language (s. 6, subs. 2) widely different from that which the Court has to construe upon this occasion.

[BRETT, J. The taxation of costs proceeds upon a final judgment. How do we get at a final judgment here?]

The finality of the decision as to costs does not depend upon the certificate sent to the Speaker. The sole and absolute jurisdiction over the costs is delegated to the election judge and to this Court.

[LORD COLERIDGE, C.J. The jurisdiction of the Court as to costs is quite independent of the dropping of the petition.

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(1) 11 East, at p. 204.

(2) Law Rep. 2 Eq. 364.

(3) Ante, p. 435.

GROVE, J. An order for costs made before the end of the proceedings would not be affected by the abatement of the petition: s. 37. Suppose the judge certified his determination to the Speaker before the dissolution, but took time to consider the question of costs, and gave his decision as to them after the dissolution, could not that order be enforced?]

It is submitted that it could: but it is not necessary to go so far in the present case. The judge has two separate and independent functions to perform: he is to certify his decision on the petition to the Speaker; and he is to declare who shall pay the costs. The costs are in no way dependent on the certificate to the Speaker. Sect. 12 throws some light upon the meaning of the word "given" in s. 11, subs. 13. (1)

C. Russell, Q.C., and *W. G. Harrison*, in support of the rule. The argument on the other side resolves itself into three propositions,—1. that a petition duly presented may be tried and determined, under the Parliamentary Elections Act, 1868, even though Parliament be dissolved before the trial comes on,—2. that, inasmuch as the decision here was pronounced before the dissolution actually took place, the judgment was final notwithstanding the certificate did not come to the hands of the Speaker until after the dissolution,—3. that, failing these two arguments, the judge or the Court had by virtue of s. 41 of the Act a separate and independent jurisdiction as to costs, which may be exercised at any time.

1. The general scope of the Act is, to put the election judges in the place of the old committees, to determine whether there has been a due election and return, with this difference only, that the decision of the committee was only to inform the House, whereas under this Act the decision of the election judge, when certified as required by s. 11, subs. 13, is final and conclusive.

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(1) Sect. 12 provides that, "if it shall appear to the judge on the trial of the said petition that any question or questions of law as to the admissibility of evidence or otherwise require further consideration by the Court of Common Pleas, then it shall be lawful for the said judge to postpone the granting of the said certificate until the determination of such question or questions by the Court, and for this purpose to reserve any such question or questions in like manner as questions are usually reserved by a judge on a trial at nisi prius." See *Davies* v. *Lord Kensington*, post, p. 720.

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[LORD COLERIDGE, C.J. Before the Grenville Act (1), the election committees were committees of the whole House.]

The argument derives no aid from s. 4, which points to an existing House of Commons. The authority of the subordinate officers only takes effect upon a vacancy in the office of Speaker by death. Sect. 19 is important; it enacts that the trial of an election petition under this Act shall be proceeded with notwithstanding the *prorogation* of Parliament. There is no such provision for the case of a dissolution. In *Carter* v. *Mills* (2), Lord Coleridge, C.J., says: "The Queen having been pleased to dissolve parliament,—of which fact the Court must take judicial cognizance,—a case has arisen not expressly provided for in the Act; and under these circumstances we must guide our proceedings by the old parliamentary practice on the subject. It is common knowledge that, according to the old practice, the petition abated or dropped in such a case." And Keating, J., says: "The effect of the dissolution, as it seems to me, is, to cause the petition to drop." It is clear, therefore, that the moment the dissolution took place this petition was at an end for all purposes, and the jurisdiction of the judge over it was gone.

2. The dissolution of parliament took place on the 26th of January. There was no evidence as to the exact hour of that day, but it may be assumed that it was after the judge had pronounced his decision in open Court and dispatched his certificate and report. The oral judgment was delivered at 10.30 a.m., and the certificate was signed and posted before noon, and reached the Speaker's hands in the course of the same evening. It is not disputed that all judicial proceedings are to be assumed to have taken place at the earliest moment of the day at which they could be transacted: *Edwards* v. *The Queen* (3); *Wright* v. *Mills*. (4) The question here turns upon the words of s. 11, subs. 13, "upon such certificate being given." Can the certificate be said to have been given until it has reached the hands of the donee? *Hurdle* v. *Waring* (5) is precisely analogous. There, the return of the writ of election to the clerk of the Crown in Chancery was held

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(1) 10 Geo. 3, c. 16. Made perpetual by 14 Geo. 3, c. 15.

(2) Ante, p. 117.

(3) 9 Ex. 628; 23 L. J. (Ex.) 165.

(4) 4 H. & N. 488; 28 L. J. (Ex.) 223.

(5) Ante, p. 435.

(4) SC 5 Jur NS 771

not to be made until that officer had received it, so that he could act upon it in the sense required by the Act.

[LORD COLERIDGE, C.J. That decision had reference to another clause of the Act and to a different state of circumstances. The person to whom the return was to be made had important duties to perform in respect of it: and we held that the return could not be said to be made until it got to his hands so that those duties might be performed by him.]

Suppose the judge to have *signed* a certificate, but to be prevented by sudden illness from presenting it?

[GROVE, J. In that case, perhaps, the Act would not be complied with. Or the certificate might be treated as an escrow. You must argue this case upon the footing that the judge had parted with the certificate as well as signed it.]

Suppose he had handed it to the registrar of the Court, and he had lost it?

[BRETT, J. The *decision* is final so soon as the judgment is pronounced in open Court. The judge could not give judgment one way and certify the other.]

The Act says the "determination shall be final to all intents and purposes." When? "Upon the certificate being given to the Speaker." If it had been intended that the judgment when delivered should be final, the legislature would no doubt have said so, instead of saying that the determination shall be final when certified to the Speaker.

3. The costs are accessory to the jurisdiction. Failing that, the right to costs fails also. If the petition is alive, it is alive with all its consequences. If at an end, nothing more can be done upon it: it is gone for all purposes.

LORD COLERIDGE, C.J. This was an application to the Court, in the matter of the Taunton election petition, to stay all proceedings, and amongst them the taxation of costs. It is material to state the facts, because I am desirous of resting my judgment upon the facts, without discussing several of the arguments which have been urged before us.

The petition was filed on the 4th of November, 1873. The trial commenced on the 12th of January, 1874, and continued from

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day to day until Monday, the 26th, on the morning of which day at about half-past ten, as we are informed by my Brother Grove, judgment was pronounced by the learned judge dismissing the petition, with costs to be paid by the petitioners. He thereupon forthwith, as required by s. 11, subs. 13, of the Parliamentary Elections Act, 1868, certified his determination in writing as to the member whom he found to have been duly elected, and made his report as to the non-existence of corrupt practices at the election, and sent the same by post before noon of that day addressed to the Speaker of the House of Commons; and it reached its destination the same evening. Parliament was dissolved by a proclamation issued on that day. We had no evidence before us as to the exact time at which the certificate and report reached the hands of the Speaker: but we have it on the authority of the Speaker of the present House of Commons (who was also Speaker of the former parliament) that the certificate was made and given before, but was not received by him until after the dissolution. It has not been found possible to ascertain the precise moment of the day at which the dissolution of the old parliament took place,—whether upon the royal sign manual being affixed to the document, or upon the countersigning by the prime minister, or on the publication in the *London Gazette*. But we are here dealing with a judicial proceeding: and it is not disputed that, when a judicial proceeding has been shewn to have taken place on a particular day, it must, in the absence of evidence to the contrary, be presumed to have taken place at the earliest moment of the day that it could take place. That is clearly settled by the elaborate and exhaustive judgment of the Court of Exchequer in *Wright* v. *Mills*. (1) We have it, then, that the certificate for costs was given during the existence of the parliament in one sense, and that my Brother Grove pronounced his judgment and by word of mouth ordered the petitioners to pay the respondent's costs. All that the judge had to do, in short, was done during the life of the late parliament. On the part of the petitioners it is contended that this is not so, because the Act of Parliament makes the concurrence of two persons necessary to the finality of the determination, and that not only must the judge give the certificate, but that the person who

(1) 4 H. & N. 488; 28 L. J. (Ex.) 223. 5 Jur N.S. 771

is to receive it, viz. the Speaker of the House of Commons, must have received it during the existence of the parliament; and that, inasmuch as the same evidence which shews that the certificate was given before the dissolution shews also that it was not received by the Speaker until after the dissolution, what has since taken place is without jurisdiction, because the recipient of the certificate had ceased to be Speaker before the document reached his hands. It becomes, therefore, necessary to consider the grounds upon which that contention rests. Our attention has been directed to various sections of the Act, and we are told and properly told that regard must be had to s. 4, which contemplates a vacancy in the office of Speaker. We have also been referred to subs. 13 of s. 11, and to the 19th and 20th and other sections. I will begin by considering subs. 13 of s. 11. I observe that the language of that subsection is very carefully framed. It is as follows: "At the conclusion of the trial, the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker; and, upon such certificate being given, such determination shall be final to all intents and purposes." Without inquiring what would have been the result if the determination had been pronounced and the certificate made and given after the dissolution of parliament, it is enough for me on this occasion to say that the terms of this subsection have been complied with. The learned judge has determined that Sir Henry James was duly elected and returned, and that the costs incurred by the respondent shall be paid by the petitioners; and his certificate has been duly made and transmitted to the Speaker. Upon this being done his determination became "final to all intents and purposes." It is said, however, that this view conflicts with our decision in the Poole Case, *Hurdle* v. *Waring* (1); and it is urged that, as we there held that the return of the writ of election to the clerk of the Crown in Chancery is not "made" within the meaning of s. 6, subs. 2, until it has reached that officer in such a manner that he can act upon it, so we must, to be consistent, hold here that the certificate of

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(1) Ante, p. 435.

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the judge has no efficacy until it has not only been sent to but received by the Speaker. It is enough to say that both the object and the words of the two subsections are altogether different. In s. 6, subs. 2, the time limited for the presentation of a petition complaining of an undue election or return was to be calculated from a particular event, viz. the making of the return to the clerk of the Crown in Chancery; and, that being followed by important consequences, we were of opinion that the event pointed to was the event as an immediate consequence of which the member returned could alone take his seat. That decision was in my opinion perfectly correct, and does not in any way conflict with the view I take on the present occasion. Under s. 11, subs. 13, the judge is to determine whether or not the member was duly elected and returned, and he is forthwith to certify in writing such determination to the Speaker: and it appears to me that the moment the judge has signed his certificate and parted with it the matter is at an end. But it is to be observed that the question now before the Court has no reference whatever to the certificate of his decision which the judge is to send to the Speaker. The subject of costs forms no part of that certificate, and strictly is not connected with it in any way. That which is in question here is whether, the judge having certified his decision to the Speaker, and having made an order for the costs, and having indorsed it on the petition, that order was made without jurisdiction, or whether that which has since happened is to take away or affect its validity. If the provisions of s. 11, subs. 13, have been complied with by the judge, and all that he had to do as to certifying his determination to the Speaker was done with jurisdiction, it follows that that portion of the judgment, viz. the decision as to costs, which was pronounced at the same time, was equally done with jurisdiction. If so, the moment that judgment was pronounced, accompanied by an order for the payment of costs by the petitioners, made by a tribunal having jurisdiction to order such payment, the respondent had a vested right to those costs, which he cannot be deprived of because something happened afterwards which put an end to the petition. It is not necessary to go into the important arguments which were raised upon s. 41. If it were, I should strongly incline to think that, even if the order for payment of costs had been made after the dissolution of parliament, the general decision and certificate having been given before, but the judge having taken time to consider in what manner he should apportion the costs, it would have been perfectly competent to the judge to make it. The 41st section gives the judge very large and elastic powers over the costs, and it seems to me to be quite immaterial at what time they are exercised by him. That is my present impression, though it is quite unnecessary to express any opinion upon it, because here the determination as to costs was pronounced at the time, and all that has been done since, or that remains to be done, is the ascertaining their amount. It is enough, therefore, to say that the costs are so merely ancillary to the judgment, that, the judgment having been pronounced before the dissolution of parliament, the respondent's right to them is not ousted by the happening of that event afterwards. We were pressed with our decision in the Exeter Case, *Carter* v. *Mills*. (1) The ground of the decision there was, that, inasmuch as nothing had been done but merely lodging the petition at the time the dissolution of parliament took place, and nothing more could be done upon it, we thought, looking at s. 26 of the Parliamentary Elections Act, 1868, and at the general principles of election law as administered by election committees in a matter upon which the Rules of Court were silent, and as the Act contains a provision for the withdrawal of a petition with the consent of the Court, we were justified in saying that the petition dropped by reason of the dissolution of parliament, and consequently that the petitioner was entitled to have his deposit returned to him. That decision in no degree conflicts with that which we arrive at here, which is, that, where a petition has been followed to its final end,—to judgment and certificate and an order for costs,—before the dissolution of parliament, nothing remaining to be done except the mere ministerial act of ascertaining the amount of the costs, the subsequent dissolution of parliament does not render void or ineffectual the judgment or the proceedings consequent upon it. That is all that I wish to be understood as deciding on the present occasion, and all that it is necessary to decide. None of the authorities referred to seem to me to approach this case. And, if costs are unhappily inflicted upon a candidate who has sought to impeach the validity of an election upon grounds which turn out to be unfounded, there is no reason why the mere accident of a dissolution of parliament taking place an hour or two afterwards should operate to relieve him from the penalty. At all events, all we have to do is to construe the Act of Parliament: and I am glad to think that the construction which we put upon it does not impose an unjust burthen upon the petitioners in this case.

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(1) Ante, p. 117.

Brett, J. I am of opinion that this rule should be discharged, and that the respondent is entitled to his costs. The arguments to the contrary amount to this, that some of the acts necessary to give the respondent a right to the costs were done after the dissolution of the late parliament. This depends upon the construction of the Ballot Act, 1868. It may be that after a petition has been once launched there might be interlocutory proceedings in respect of which costs may have been awarded; and these in my opinion might be enforced notwithstanding the petition might afterwards drop, by a dissolution or otherwise, though no new steps on the petition could be taken. At the trial of the petition, the judge is to determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void; and he is forthwith to certify in writing such determination to the Speaker; and upon such certificate being given such determination is to be final to all intents and purposes: 31 & 32 Vict. c. 125, s. 11, subs. 13. It may be that a dissolution taking place before trial may abate the petition. But I am clearly of opinion that a dissolution taking place after the judge has pronounced his decision and signed a certificate of such determination, the vested rights of the successful party under the decision may still be enforced. In the case of the Exeter Election Petition (1), the Court held that, where parliament was dissolved before the day fixed for the hearing of a petition, by analogy to the old practice of election committees the petition dropped. Now, the determination of the judge under s. 11, subs. 13, is the decision which he gives in open Court. That having once been given, he has no jurisdiction to alter it. The judge is forthwith to certify his determination in writing to the Speaker. I *doubt* whether a certificate could be given after a dissolution of parliament. It is unnecessary to say more. It may be that, under s. 4, the certificate might be sent to the clerk of the House of Commons. But here it seems to be clear that the certificate was drawn up and delivered out as the final decision of the judge before the dissolution took place, though it did not reach the hands of the Speaker until after the dissolution. It has been argued that there is no final determination until the certificate has actually reached the hands of the person to whom it is addressed,—the giving of the certificate under s. 11, subs. 13, involving a donee as well as a donor: and in support of this contention the case of the Poole Election Petition (1) is relied on as shewing that this petition is still undetermined, and consequently drops, and that nothing can now be done under it. That case turned upon the construction of s. 6, which required the petition to be presented or filed "within twenty-one days after the return has been made to the clerk of the Crown in Chancery of the member to whose election the petition relates." Looking at the state of things with reference to which that phrase was used, the Court determined, according to the well-established rules of construction, that the return was not made until the writ with the certificate of the returning officer indorsed thereon reached the hands of the clerk of the Crown in Chancery so that he could act upon it. There is nothing, however, in the language of s. 11, subs. 13, to make our holding as we now do at all inconsistent with that decision. Under that subsection, the point of time at which the determination of the judge is to be final is, "upon such certificate being given." It is true the judge is directed to certify in writing his determination *to the Speaker:* but the time when the determination is to be final is to be the time when the certificate is given, and that, as it seems to me, is, when the judge gives it out as his certificate, and not when it reaches the hands of the Speaker. A question has been raised whether, the decision having been pronounced before the dissolution of parliament, an order as to costs could properly be made after. I do not think it necessary to determine that upon the

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(1) *Carter* v. *Mills*, ante, p. 117.

(1) *Hurdle* v. *Waring*, ante, p. 435.

present occasion; though I incline to think that, if all that was necessary to the finality of the decision occurred before the dissolution, a valid order for costs might be made after. Here, the determination of the judge was pronounced and a certificate thereof given and an order for costs pronounced during the existence of the late parliament. There remained, therefore, nothing more to be done. The moment the final judgment was given, the respondent had a vested right to the costs, which he was entitled to enforce independently of the Act of Parliament. Another point was raised, which is open to some doubt, viz. whether, supposing the judge to have given his determination upon the merits of the petition, and to have certified the same to the Speaker, but to have reserved the question of costs, and a dissolution took place before a decision was come to on that subject, the successful party could recover costs. It is enough, however, to say that that is not this case.

GROVE, J. I have but little to add to what has fallen from my Lord and my Brother Brett. Although no question has been raised affecting my direction, I have purposely abstained from making any remarks in the course of this discussion, being anxious first to learn the impression of the rest of the Court. Two distinct matters are to be considered here; one, the jurisdiction of the election judge to determine the questions raised before him, the other, the communication to the Speaker of the result which he has arrived at. It seems to me that the decision is complete and final when the judge has pronounced his opinion and given a certificate for the Speaker: and my strong impression is that, under s. 41 of 31 & 32 Vict. c. 125, at all events, the power of making an order as to costs, which order is to have the force of a judgment, is quite independent of the certificate to be sent to the Speaker. That section gives the judge a plenary power over the costs, enabling him to make an order which forms no part of his judgment as to the seat, but is an independent judicial decision as to the person by whom the costs are to be borne. We have been pressed with certain analogies which do not strictly bear upon this matter, because the history of costs is the creature of statutes which give limited power to the Courts to deal with them. No costs could, as such, be given before the Statute of Gloucester. Therefore, in considering a question of costs under this statute, we cannot draw any analogy from the common law. It seems to me that the Act under consideration gives the judge power to make a valid order as to costs. It is conceded that it is not necessary to mention costs in the certificate sent to the Speaker, that being a matter which is altogether alio intuitu. "At the conclusion of the trial, the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker; and upon such certificate being given such determination shall be final to all intents and purposes." Here, the judge did determine that the sitting member was duly elected. "Determine" implies finality. The determination of the judge may not be final for some purposes: but, so far as his power goes, it is final the moment he has pronounced it. For the purpose of determining the question which was before him, he was functus officio. The Act, however, requires something further, viz. a certificate to the Speaker. That implies that the judge has determined. He is to certify the conclusion to which he has come. It may be conceded that, if the certificate remained in the hands of the judge, and he was still considering the matter, that might not be final. But, when the judge has signed and delivered it to the officer of the Court, and so parted with all control over it, the judge's duty is performed: he has nothing more to do. Here, the decision of the judge upon the petition was pronounced, the order for payment of costs by the petitioners was made, and the certificate signed and sent to the Speaker, while the parliament was in existence. Can a subsequent event undo all that and make it not a judicial proceeding? Clearly not. Both upon the construction of s. 41 and upon that of s. 11, subs. 13, I am of opinion that all was done to entitle the respondent to costs.

Rule discharged, with costs.

Attorneys for petitioners: *Ellis & Co.*
Attorney for respondent: *Holmes.*

1874
June 2.

IN RE HAVERFORDWEST ELECTION PETITION.

DAVIES, PETITIONER; LORD KENSINGTON AND HARDING, RESPONDENTS.

Parliament — Election Petition — Expenses of Preparations for an Election under the Ballot Act, 1872—*Refusal of Returning Officer to nominate a Candidate—Reform Act,* 2 *Wm.* 4, *c.* 45, *s.* 71—*Ballot Act*, 35 & 36 *Vict. c.* 33, *ss.* 1, 8.

Tb CB 741

The expenses of carrying into effect the provisions of the Ballot Act, 1872 (35 & 36 Vict. c. 33), are to be borne in the first instance by the returning officer, and to be apportioned between and recovered by him from the several candidates.

The pre-payment of or security for the estimated amount of such expenses cannot be insisted upon by the returning officer as a condition precedent to his putting the candidate in nomination.

Where, therefore, the returning officer refused to nominate one of two candidates on the ground that he declined to submit to such a demand, the return of the other candidate was upon a special case declared void.

CASE stated for the opinion of the Court under the Parliamentary Elections Act, 1868, s. 11, subs. 16.

1. At the general election in 1874, the respondent Harding was the returning officer for the borough of the town and county of Haverfordwest.

2. The said borough is entitled to return one member to parliament.

3. The election for the borough was duly appointed by the returning officer to be holden on the 2nd of February, 1874, in the grand jury room of the Shire Hall at Haverfordwest between the hours of 11 a.m. and 1 p.m.

4. Within the two hours appointed for the election, the respondent Lord Kensington appeared in the grand jury room as a candidate, with two registered electors as his proposer and seconder, and accompanied by his agent, and handed in his nomination paper, signed by such proposer and seconder, and purporting also to be signed by eight other registered electors; and at the same time deposited with the returning officer 60*l.* as a deposit for one moiety of the returning officer's expenses in carrying into effect the provisions of the Ballot Act, 1872.

5. During the two hours aforesaid, the petitioner also appeared in

the grand jury room unaccompanied by any proposer or seconder or other person, and handed in a nomination paper signed by two registered electors as his proposer and seconder, and by eight other registered electors.

6. The petitioner's address to the electors of the borough was posted in the public places of Haverfordwest several days previous to the day of election; and immediately on its appearance the returning officer wrote and sent to the petitioner a letter in the following terms:—

"Haverfordwest, Jan. 29, 1874.

"Dear Sir,—I observe that you have published an address to the electors of this borough.

"As it will be utterly impossible for me to make the necessary arrangements for the poll if the London orders are deferred longer than to-morrow, I must ask you to be prepared with a sufficient deposit, or approved security, by to-morrow at noon.

"Be pleased to let me hear from you in the meantime the course you intend to adopt.

(Signed) "W. L. Harding,
"Sheriff of Haverfordwest."

To this letter no reply was sent by the petitioner.

7. When the petitioner presented his nomination paper, the returning officer demanded of him a deposit of 40*l.*, with which the petitioner was not prepared, and did not make. The returning officer thereupon wrote out and served upon the petitioner a notice of which the following is a copy:—

"To Mr. T. W. Davies.

"I hereby give you notice and require you to deposit with me the sum of 40*l.*, or to give me approved security for the like sum, by 1 o'clock (local time) this day, or, in default of your doing so, I shall decline to notice your candidature at the present election for Haverfordwest. The above sum is one moiety of the estimated disbursements by the sheriff.

(Signed) "W. L. Harding, Sheriff."

8. Assuming that the returning officer was entitled to demand any deposit or security from the petitioner, the said sum of 40*l.* was not an improper or unreasonable sum to be paid as the

amount to be deposited or secured; and in fact 40*l.* was the sum which might properly have been paid.

9. The petitioner did not, either during the two hours appointed for the election, or at any time afterwards, pay or tender to the returning officer the sum of 40*l.* or any other deposit, or give or offer to give any security for the said sum of 40*l.*, or any other sum.

10. The petitioner did not during the time appointed for the election give any notice to the effect that he withdrew from his candidature, signed by him, to the returning officer.

11. The petitioner did not declare, nor was he called upon to declare in writing to the returning officer, on or before the day of nomination, the name or address of any agent or agents: but the petitioner contends that, if he had been nominated properly, he would have had by law the whole of the rest of the day for the purpose of appointing such agent.

12. The returning officer under the circumstances, without adjourning the election for the purpose of taking a poll, declared Baron Kensington to be duly elected, and returned his name to the clerk of the Crown in Chancery.

The question for the opinion of the Court was, whether Baron Kensington was duly elected and returned.

Gorst (*Alfred Hardy* with him), for the petitioner. The sheriff had no right to impose it as a condition of his being put in nomination that the petitioner should make a deposit or give security for the reimbursement to the sheriff of the expenses he might incur in the performance of a duty which the law casts upon him. The petitioner had done all that was required of him when he complied with the requirements of the first paragraph of s. 1 of the Ballot Act, 1868 (35 & 36 Vict. c. 33), by tendering a nomination paper duly subscribed. The second paragraph of s. 8 enacts that "all expenses properly incurred by any returning officer in carrying into effect the provisions of this Act in the case of any parliamentary election, shall be payable in the same manner as expenses incurred in the erection of polling booths at such election are by law payable." This throws us back upon ss. 68 and 71 of the Reform Act, 2 Wm. 4, c. 45, which, like the earlier statutes of 18 Geo. 2, c. 18, s. 7, 34 Geo. 3, c. 74, s. 6, and 51

Geo 3, c. 126, s. 1, in terms require the returning officer to make the requisite preparations for the election, and impower him to recoup himself by calling upon the candidates: *Morris* v. *Burdett* (1); *Morris* v. *Burdett* (2); *Muntz* v. *Sturge.* (3) If the legislature had intended to authorize the returning officer to demand pre-payment or security, they would have said so in plain terms. The misconduct of the sheriff clearly renders the election void.

C. S. Bowen, for Lord Kensington. The returning officer was right in refusing to consider the nomination of Mr. Davies a real one. The first question is whether it was a condition precedent to the right of Davies to be put in nomination that he should have been ready and willing to pay his proportion of the expenses of preparing for a ballot. Sect. 8 of the Ballot Act leaves the law as to these expenses as it stood before. The first part of s. 68 of the Reform Act is repealed by the 3rd schedule of the Ballot Act, 1872; but s. 71 is left untouched. That section enacts that the polling booths shall be erected by the sheriff or other returning officer "at the expense of the several candidates." The same expression is found in 18 Geo. 2, c. 18, s. 7, and 34 Geo. 3, c. 74, s. 6, and 51 Geo. 3, c. 126, s. 1, and may reasonably be construed to mean "the candidates finding the money," just as the expression in a lease in which the tenant covenants to repair, the landlord finding timber or money, imports a condition precedent that the timber or the money shall be provided beforehand. In *Morris* v. *Burdett* (1), there appeared to have been a usage for the candidates to share these expenses. *Muntz* v. *Sturge* (3) went entirely upon the ground that the defendant never was a candidate at all, because he did not go to the poll. The rest of the judgment was obiter. At all events, the election is not avoided merely because one element in the contemplated machinery introduced by the Ballot Act failed.

[LORD COLERIDGE, C.J. That is an argument that might have been urged in the *Hackney Case* (4), where the election was rendered abortive through the neglect of the returning officer to provide ballot boxes at one of the voting places.]

(1) 1 Camp. 218.
(2) 2 M. & S. 212.
(3) 8 M. & W. 302.
(4) Not reported.

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Le Marchant, for the sheriff. Having no decisions upon the subject to guide him, the returning officer here acted upon the best of his judgment; and no one suggests that he was actuated by any improper motives. The Court will not, therefore, visit him with costs. None were imposed in the *Hackney Case.* (1) In the *Great Grimsby Case* (2), although the House censured the returning officer, they imposed no costs upon him.

Lord Coleridge, C.J. The question which we are asked to determine in this case is, whether Lord Kensington was duly elected and returned as a member of Parliament for the borough of Haverfordwest. Now, Haverfordwest, which is a county of a town, and has a sheriff, is entitled to return one member only. At the election holden on the 2nd of February, 1874, Lord Kensington was duly proposed as a candidate, and Mr. Davies was also duly proposed as another candidate. The duties of the returning officer with regard to the nomination of candidates is defined in the first two paragraphs of s. 1 of the Ballot Act, 35 & 36 Vict. c. 33: "A candidate for election to serve in parliament for a county or borough shall be nominated in writing. The writing shall be subscribed by two registered electors of such county or borough as proposer and seconder, and by eight other registered electors of the same county or borough as assenting to the nomination, and shall be delivered during the time appointed for the election to the returning officer by the candidate himself or his proposer or seconder." "If at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, and return their names to the clerk of the Crown in Chancery; but, if at the expiration of such hour more candidates stand nominated than there are vacancies to be filled up, the returning officer shall adjourn the election, and shall take a poll in manner in this Act mentioned." The nominations of Lord Kensington and of Mr. Davies in this case were duly handed to the sheriff within the prescribed time, save that the latter appeared without any proposer or seconder; but, Mr. Davies having failed

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(1) Not reported.

(2) 1 Peck. 59, 75.

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to deposit or give security for 40*l.*, which the returning officer demanded as a moiety of the estimated expenses to be incurred by him in carrying out the provisions of the Ballot Act, the sheriff declined to put Mr. Davies in nomination, and at the expiration of the time fixed by him returned Lord Kensington as duly elected. The question is whether the sheriff was justified in his refusal to put Mr. Davies in nomination as a candidate. It is said that he was justified, because Mr. Davies had refused to deposit a sum of money or to give security for the payment of his share of the expenses of preparing for the election. It is found that 40*l.* was not an improper sum to demand; and no one impugns the sheriff's motives. He appears to have acted upon his own view of his duty. The question is whether a returning officer, before accepting the nomination of a candidate, is entitled by law to demand payment or security for the expenses of preparing for the election. I am of opinion that he is not. The returning officer is the person by whom those expenses are to be borne in the first instance. This question is to be determined upon two Acts of Parliament, which it is satisfactory to find have received a construction from the highest authority. The Ballot Act (35 & 36 Vict. c. 33) does not help us, because s. 8, which defines the general powers and duties of the returning officer, merely provides that the expenses properly incurred by any returning officer in carrying into effect the provisions of that Act, shall be payable in the same manner as expenses incurred in the erection of polling booths at such election are by law payable. That leaves the law as to the expenses of preparing for an election as it stood under ss. 68 and 71 of the Reform Act, 2 Wm. 4, c. 45. I do not know that s. 68 is very important, because that part of it which relates to polling booths is repealed. It imposed upon the sheriff the duty of providing at every contested election convenient polling booths, and may throw some light upon the construction of s. 71, which is still the law. It enacts that "all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates, and the same shall be erected by contract with the candidates if they shall think fit to make such contract, or, if they shall not make such contract, then the same shall be erected by the sheriff or other returning officer at the expense of the several candidates as aforesaid, subject to such limitation as is hereinafter mentioned, that is to say, that the expense to be incurred for the booth or booths to be erected at the principal place of election for any county, riding, parts, or division of a county, or at any of the polling places so to be appointed as aforesaid, shall not exceed the sum of 40*l.* in respect of any one such principal place of election, or any one such polling place; and that the expense to be incurred for any booth or booths to be erected for any parish, district, or part of any city or borough, shall not exceed the sum of 25*l.* in respect of any one such parish, district, or part," &c. There is nothing in that section to justify the sheriff or other returning officer in refusing to put in nomination a candidate who declines to make a previous deposit of the estimated expense of the erection of the polling booths. The person who is to erect them is the returning officer. There is not a trace in that or in any other part of the Act of any intention to make the payment of the expenses a condition precedent to the right of the candidate to be put in nomination. If it had been intended that so serious a power should be placed in the hands of the returning officer as that of refusing to put a candidate in nomination, it would have been done in clear and plain language. But we are not left to decide this by the light of our own unaided judgment. The section received a judicial construction by the Court of Exchequer in the year 1841, in the case of *Muntz* v. *Sturge*. (1) It was there held that the "candidate," who is liable under ss. 68 and 71 to pay a proportion of the expenses of the erection of the polling booths, &c., is one who goes to the poll. The judgment of the Court, consisting of Lord Abinger, C.B., and Barons Parke and Alderson, distinctly shews that the sheriff is not entitled to impose the payment or deposit of a sum for election expenses as a condition to the putting a proposed candidate in nomination. They say: "Undoubtedly, before the nomination, the defendant had been, according to the facts stated in the case, in a popular sense at least, a candidate. But we are of opinion that the contest referred to in the 68th section is a contest by a poll, and the candidates referred to in the 71st section are candidates at a poll; and, consequently, that the defendant, having, immediately after the shew of hands declined to go to the poll, never was a candidate within the meaning of the Act. It was urged upon us by the plaintiff's counsel that this cannot be the true construction of the Act, inasmuch as the returning officer is necessarily obliged to incur a large portion of the expense before the day fixed for the nomination; it being often impossible to erect the necessary booths between the time of the nomination and the actual commencement of the poll,—a difficulty which is increased since the passing of the 5 & 6 Wm. 4, c. 36, whereby the duration of the poll is limited to one day, and the number of electors who can vote at any one polling place is confined to 300. It must be admitted that the construction which we put on these clauses may, in some cases, possibly, though not very probably, cast on the returning officer the burthen of preparing at least for the erection of booths, when there may be never any person answering the description of a candidate eventually liable to reimburse him. But at most this only shews that in certain rare cases the post of returning officer may be one of an onerous character; and the legislature may well have considered that to be a far less evil than it would be to prevent proper persons from being proposed, under the fear that the proposers might afterwards become liable to the expenses of a poll, in which they may have taken no part. We may further observe that the same enactment which makes the candidates liable to the expense of the booths also makes them liable to the expense of the deputies and poll-clerks employed in taking the poll. It is difficult to believe that the legislature could have meant to throw the burthen of these latter expenses on any persons except those for whose benefit they have been incurred, viz. the candidates who come to the poll: and this, therefore, is strongly confirmatory of the construction we put on the word 'candidate' as used in the 71st section. Our attention was pointed in the argument to the passage in the 68th section which directs the returning officer to give two days' notice before the commencement of the poll, of the situation, division, and allotment of the different booths. This certainly shews that, in some cases, the returning officer must erect, or at all events have made preparations for erecting, booths before he knows whether there will or will not be any necessity for them. But, as we have already stated, we do not feel the argument of the plaintiff result-

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(1) 8 M. & W. 302.

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ing from that state of things as amounting to anything like a reductio ad absurdum." It was said that that was not a decision upon the very point at issue here. But the Act came before the Court to be construed; and one of the points pressed there was strongly urged here, viz. the hardship upon the returning officer of compelling him to incur expenses without being able to ascertain beforehand who is to recoup him. But the Court, after time taken to consider, came to the conclusion, upon the 71st section of the Reform Act, that the legislature intended to cast that burthen upon the returning officer. Construing the Ballot Act by the light of that statute, I come to the same conclusion in this case. Our attention has been called to some earlier statutes and authorities, all of which, in my judgment, tend in the same direction. The 18 Geo. 2, c. 18, s. 7, as to county elections, enacts that the sheriff or undersheriff shall appoint, make, and erect, &c., *at the expense of the candidates,* "such number of convenient booths as the candidates or any of them shall, three days at least before the commencement of the poll, desire," &c. Sect. 6 of 34 Geo. 3, c. 74, which applies to elections generally, enacts that the returning officer shall, on notice from the candidates, provide proper places for administering the oaths prescribed by the Act, "the expense of which booths or places, &c., shall be defrayed and repaid by the candidates at such election, in equal proportions, to the returning officer who shall have incurred such expense." And the 51 Geo. 3, c. 126, s. 1, with regard to the city of Westminster, enacts that the bailiff or his deputy "shall appoint, make, or erect, or cause to be appointed, made, or erected, at the expense of the candidate or candidates, a convenient booth or place for holding the election." Now, the 18 Geo. 2, c. 18, s. 7, as extended by 51 Geo. 3, c. 126, received a construction by Lord Ellenborough in *Morris* v. *Burdett* (1), where he says (2): "The stat. 18 Geo. 2, c. 18, s. 7, enacts that the sheriff shall erect such number of booths at the expense of the candidates as they or any of them shall desire; which is different in that respect from the present Act (3); for, here the Act imposes the duty on the bailiff in the first instance, and says that it shall be at the expense of the candidates. If there be no candidates, the burthen rests with the bailiff. This may be a hardship, but we cannot, because the legislature have imposed an onerous duty on the bailiff, strain the meaning of the word 'candidate' beyond its fair import, in order to throw the burthen of that duty upon others." He, therefore, puts the same construction upon the older statute as the Court of Exchequer put upon 2 Wm. 4, c. 45, s. 71, in the case of *Muntz* v. *Sturge* (1), viz. that the Act imposed upon the returning officer the duty of erecting the polling places, and cast upon the candidates the obligation of reimbursing him the reasonable expenses incurred by him in so doing. In the first case of *Morris* v. *Burdett* (2), the defendant was held liable for those expenses which he impliedly sanctioned; but, in the second (3), he was held not to be liable, because he was not in the proper sense of the word a candidate.

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(1) 2 M. & S. 212.

(2) 2 M. & S. at p. 218.

(3) 51 Geo. 3, c. 126, s. 1.

What, then, is the result? Under the old law, the duty of the high bailiff was absolute, to prepare for the election; and, when it was over, he was entitled to recover the expenses from the person or persons for whom those expenses were incurred. That was the burthen which the legislature thought fit to cast upon him. It seems to me, therefore, that there was no pretence for saying that the sheriff here had a right to insist upon prepayment or security for that for which he himself was primarily responsible; and that he improperly insisted upon a condition he had no right to impose, and his refusal to put Mr. Davies in nomination was without justification, and consequently the election and return of Lord Kensington was void.

The only question which remains is how the costs are to be disposed of. I am of opinion that the precedent in the *Hackney Case* may very properly be followed here. Lord Kensington clearly was not wrong. He did not in any way interfere. It would be unjust, therefore, to saddle him with costs. The case of the returning officer is open to more doubt. Nobody casts any blame upon him, however, for the course he pursued; and there is no suggestion that he acted otherwise than upon an erroneous view of his rights. I therefore think he will be sufficiently punished by having to bear his own costs of this case. With regard to Mr. Davies, inasmuch as he did not condescend to reply to the letter set out in paragraph 6 of the case, I think he has only himself to blame if he also is left to bear his own costs.

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(1) 8 M. & W. 302.
(2) 1 Camp. 218.
(3) 2 M. & S. 212.

BRETT, J. This case is founded upon the assumption that the sheriff has committed a wrong in refusing to put a candidate in nomination at the election for the borough of Haverfordwest, and has improperly departed from the duty imposed upon him by s. 1 of the Ballot Act, 35 & 36 Vict. c. 33, in refusing to put a candidate in nomination. On the other hand, it is contended that the candidate omitted to do something which was a condition precedent to his right to require the sheriff to put him in nomination. Now, the 1st section of the Ballot Act describes the manner in which the nomination is to take place: "A candidate for election to serve in parliament for a county or borough shall be nominated in writing. The writing shall be subscribed by two registered electors of such county or borough as proposer and seconder, and by eight other registered electors of the same county or borough as assenting to the nomination, and shall be delivered during the time appointed for the election to the returning officer by the candidate himself or his proposer or seconder." That was complied with by Mr. Davies. The next paragraph provides that, "if at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, and return their names to the clerk of the Crown in Chancery." It then goes on to say that, "if, at the expiration of such hour, more candidates stand nominated than there are vacancies to be filled up" (which was this case), "the returning officer shall adjourn the election, and shall take a poll in manner in this Act mentioned." It is suggested here, that, inasmuch as at the expiration of one hour there were more candidates than vacancies, the sheriff was wrong in not adjourning the election and taking a poll. Taking that section alone, it is clear that the returning officer has not done that which the Act directs him to do. But it is said that Mr. Davies was bound to make a deposit or to give security for his share of the expense of the preparations for the election before he was entitled to stand in the position of a candidate. But s. 8 of the Ballot Act casts upon the returning officer the duty of providing polling stations. It enacts that, "subject to the provisions of this Act, every returning officer shall provide such nomination papers, polling stations, ballot-boxes, ballot-papers, stamping instruments, copies of register of voters, and other things as may be necessary for effectually conducting an election in manner provided by this Act." Having stated that the returning officer shall provide these things, the section goes on to provide that "All expenses properly incurred by any returning officer in carrying into effect the provisions of this Act in the case of any parliamentary election, shall be payable in the same manner as expenses incurred in the erection of polling booths at such election are by law payable." This section, therefore, seems to throw upon the returning officer the burthen of providing polling stations, &c., with a right to claim reimbursement in manner provided by the law before the passing of that Act. On the part of the sheriff here it is said that that is by prepayment or security for an estimated sum as the cost of such preparations. To determine this we must look at the Reform Act, 2 Wm. 4, c. 45. That Act deals in the first place with counties. Sect. 63 enacts that counties shall be divided into districts for polling. Sect. 64 enacts "that at any contested election for any county, or riding, parts, or division of a county, the sheriff, under-sheriff, or sheriff's deputy, shall, if required thereto by or on behalf of any candidate on the day fixed for the election, and, if not so required, may, if it shall appear to him expedient, cause to be erected a reasonable number of booths for taking the poll at the principal place of election, and also at each of the polling places so to be appointed as aforesaid." Taking these two sections together, it is clear that there must, if required by or on behalf of any candidate, be a polling place erected in each district. It is true there is no specific enactment in the Act in this respect as to boroughs; but it would seem by necessary intendment there must be polling places in boroughs. Sect. 68 puts boroughs in the same position as counties in this respect. Then comes s. 71, which enacts that "all booths erected for the convenience of taking polls shall be erected at the joint and equal

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expense of the several candidates" (not saying by whom, though, if it had been intended that the candidates should do it, it would have been easy to say so), "and the same shall be erected by contract with the candidates if they shall think fit to make such contract, or, if they shall not make such contract, then the same shall be erected by the sheriff or other returning officer at the expense of the several candidates as aforesaid, subject to such limitation as is hereinafter next mentioned," &c. That does not in terms make the providing the money a condition precedent to the right of a candidate to be put in nomination. The returning officer is to do it on a contract or on an estimate. If the latter, the candidates are to pay the reasonable costs, not exceeding certain limits. I find nothing either in 2 Wm. 4, c. 45, s. 71, or in any of the earlier statutes, to make the payment or tender of the expenses a condition precedent to the right of the candidate to be put in nomination. To justify us in so holding, the intention should have been expressed in clear and unambiguous terms. To my mind it is plain that Lord Ellenborough, in the second case of *Morris* v. *Burdett* (1), did not consider the words "at the expense of the candidates" to import a condition precedent. Notwithstanding that that was not the ground of the decision, yet the matter was brought directly before the Court; and I cannot make up my mind to reject a strong expression of opinion merely on the ground that it was not necessary to the decision of the case; especially where, as in the next case, *Muntz* v. *Sturge* (2), the Court took the matter into consideration and pronounced a judgment upon it. Looking, therefore, at the several Acts of Parliament and at the authorities, I am clearly of opinion that the Ballot Act, as construed by the light of the former legislation on the subject, does not impose it upon a candidate, as a condition precedent to his right to be put in nomination at an election for a member of parliament, that he shall deposit or give security for his share of the expenses to be incurred by the returning officer in preparations for the conduct of the election; and that all that the candidate is bound to do is to comply with the requirements of 35 & 36 Vict. c. 33, s. 1.

(1) 2 M. & S. 212.

(2) 8 M. & W. 302.

The refusal of the returning officer to put the second candidate in nomination was a breach of duty which altogether avoided the election, and therefore we must hold the return of Lord Kensington to be void.

As to the costs, I entirely agree with my Lord. Lord Kensington did no wrong, and therefore cannot be visited with costs. I also feel disinclined to give costs against the returning officer, because, although I think he acted improperly, I also think that Mr. Davies pursued a course which was censurable.

Judgment for the petitioner.

Bowen asked the Court to certify under s. 11, subs. 16 (1), of the Election Petitions Act, 31 & 32 Vict. c. 125.

PER CURIAM: That will be done forthwith.

Attorneys for petitioner: *Ellis & Co.*
Attorneys for Lord Kensington: *Wyatt, Hoskins, & Hooker.*
Attorney for returning officer: *T. H. Smith.*

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(1) 31 & 32 Vict. c. 125, s. 11, subs. 16: "where, upon the application of any party to a petition made in the prescribed manner to the Court, it appears to the Court that the case raised by the petition can be conveniently stated as a special case, the Court may direct the same to be stated accordingly; and any such special case shall, as far as may be, be heard before the Court, and the decision of the Court shall be final; and the Court shall certify to the Speaker its determination in reference to such special case."

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June 22.

CPD 28
CPD 184
— 231–5

In re PETERSFIELD ELECTION PETITION.

STOWE, Appellant; JOLLIFFE, Respondent.

Parliament—Conclusiveness of Register—Persons prohibited from voting by Statute or by Common Law of Parliament—Receipt of Alms, &c.—Reform Act (2 *Wm.* 4, *c.* 45), *ss.* 54, 58, 60—*Registration Act* (6 *Vict. c.* 18) *s.* 79, 98—*Ballot Act*, 1872 (35 *&* 36 *Vict. c.* 33) *s.* 7.

Sect. 7 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), enacts that every person whose name is on the register for the time being in force "shall be entitled to demand and receive a ballot paper, and to vote,"—"Provided that nothing in this Act shall entitle any person to vote who is prohibited from voting by any statute or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting:"—

Held, that, notwithstanding the Ballot Act has repealed ss. 68 and 70 of the Reform Act and s. 98 of the Registration Act, the register is conclusive not only on the returning officer, but also on every tribunal which has to inquire into elections, except only in the case of "persons prohibited from voting by any statute or by the common law of parliament,"—persons who from some inherent or for the time irremoveable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors; such as peers, women, persons holding certain offices or employments under the Crown, persons convicted of crimes which disqualify, or the like.

The proviso is not pointed at disqualification by reason of the receipt of parochial relief or other alms since the date of the register, non-residence within the prescribed distance of the borough, non-occupation, insufficient qualification, or the like. As to these the register is conclusive, and their votes cannot be struck out by the election judge on a scrutiny.

Case stated by Mellor, J., under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 11, subs. 16.

This was a petition under the Parliamentary Elections Act, 1868, against the return of the respondent as a member of Parliament for the borough of Petersfield, Hampshire, which came on to be tried before me at the said borough on the 21st, 22nd, 23rd, 24th, and 25th of April, 1874. The petition prayed that it might be determined that the respondent was not duly elected or returned by a majority of legal votes, and that William Nicholson, the other candidate at the said election, had a majority of legal votes and ought to have been returned instead of the respondent. On the trial the following facts were admitted or proved; and I have thought it right to reserve for the opinion of the Court of Common Pleas certain questions which arise therefrom.

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1. At the last election for the borough of Petersfield the respondent and William Nicholson were respectively candidates.

2. The nomination took place on the 30th of January, 1874, and the poll was taken on the 3rd of February, 1874; and the returning officer returned the respondent as being duly elected.

3. The number of votes recorded for the respective candidates were as follows,—for the respondent, 372, and for William Nicholson, 361; making a majority for the respondent of 11 votes.

4. Twenty voters who voted for the respondent at the last election, and ten voters who voted for Mr. Nicholson, were proved to have received parochial relief, within the meaning of s. 36 of 2 Wm. 4, c. 45, between the 31st of July, 1873, and the day of the election.

5. There is a charity which is under the management of the trustees of the will of the late John Goodger, dated on or about the 22nd of April, 1864; and the funds are applied, in conformity with the directions of his will, for the benefit of the poor inhabitants and the poor children of the tithing of Weston, in the county of Southampton. The material part of the will is as follows:—

"Item. I give to the poor people of the tithing of Weston aforesaid 20*s*., to be distributed within a month after my decease, at the discretion of my executor hereafter named. I give and devise unto my honored friend Leonard Billson, Esq., and my nephew Edmund Talden, in the county of Surrey, clerk, and to their heirs and assigns for ever, all my messuage or dwelling-house, together with all the barns, stables, outhouses and buildings, and all the gardens and orchards thereunto belonging, situate in Weston aforesaid, wherein I now live, and in my possession: and likewise all those lands in Weston aforesaid called Half-Penny-Land, now in the possession of Thomas Jacques, together with free liberty to water and overflow the said land as it is now and heretofore hath been used for the best improvement thereof; to the intent and purpose that the said L. Billson and E. Talden, and the survivor of them, their heirs and assigns, shall grant and convey all the said messuage, land, and premises, with the appurtenances, unto six able, honest, and sufficient persons, their heirs and assigns, as they or the survivor of them shall think fit: Upon trust and confidence, and to the intent and purpose that all the yearly rents, issues, and profits of the said messuage, lands, and premises, shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the tithing of Weston aforesaid; and the overplus thereof shall be distributed unto the poorest inhabitants of the said tithing of Weston aforesaid, as my said trustees and their assigns shall think fit."

Fourteen voters who voted for the respondent, and one who was also objected to by the petitioner, but who voted for Mr.

Nicholson, received clothing or goods since July 31st, 1873. The son of another voter for the respondent was before the said date and now is apprenticed by the charity; and the son of another such voter was before and since the said date educated by the charity.

6. Fifteen other voters who voted for the respondent at the last election were proved to have received parochial relief also, within the meaning of s. 36 of 2 Wm. 4, c. 45, within twelve months previously to the 31st of July, 1873.

7. One other voter who voted for the respondent at the last election was proved not to have resided within the borough, or within seven statute miles thereof or of any part thereof, in the year preceding the 31st of July, 1873, or between that time and the day of the election.

8. One other voter who voted for the respondent at the last election was proved not to have resided within the borough, or within seven statute miles thereof or of any part thereof, at any time between the middle of July, 1873, and the beginning of November, 1873.

9. Thirteen other voters, the nature of whose qualification appeared upon the register to be the occupation of premises in the borough, and who, save as aforesaid, had no other qualification, who voted for the respondent, were proved to have occupied the premises, but not to have occupied them as owners or tenants at any time between the 31st of July, 1872, and the day of the election.

10. Twelve of the voters alluded to already under some previous head other than that mentioned in the last paragraph, and being voters who voted for the respondent, were proved to have had no sufficient qualification entitling them to be upon the register, on the ground of non-occupation, non-rating, or change of occupation.

11. The register of voters and the petition may be referred to, if necessary, as part of this case.

12. The question is whether any of the above votes ought to be struck out and disallowed; and, if so, which of them; and such as ought to be struck out and disallowed must be taken off the number polled, and the majority determined accordingly.

13. The parties have agreed to my stating this case as a way of reserving the questions. But, if necessary, I must further report to the Court, as the Court may require.

14. I have reserved my determination whether the respondent was duly returned, or whether he was not and the said William Nicholson was duly elected and ought to have been returned, until the Court has determined the above questions: and I shall certify to the Speaker of the House of Commons according to the decision of the Court.

Giffard, Q.C. (*C. S. C. Bowen* with him), for the petitioner. The questions involved in this case are, how far the petitioner is entitled to go behind the register on a scrutiny as to the qualification of voters, and whether certain of the voters were not disqualified by the receipt of alms, according to the law of parliament, in which case the petitioner would be entitled to succeed; also, in the event of the petitioner's being able to prove disqualifications arising since the date of the register by receipt of relief and cessation of occupation, he would be entitled to succeed. The respondent will rely on s. 7 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), which enacts that every person whose name is in the register shall be entitled to receive a ballot paper and to vote. This section was intended to refer only to the procedure at an election, and to relate to the authority of the returning officer, not to impose any further limitation upon the authority of the tribunal before which the validity of the vote may ultimately come in question. It is but the completion of the previous course of legislation on the subject, and was intended to apply to the vote by ballot an equivalent to that which before applied to open voting. Originally, the returning officer himself decided on the validity of the vote when tendered, and a scrutiny might be granted by him; and in addition there was the ordinary jurisdiction of the House of Commons. Then came the Act of 1832. By ss. 37 and 54 of 2 Wm. 4, c. 45, the register was instituted. By s. 58 the returning officer might put three questions, and no others; the last being whether the candidate had the same qualification as that for which he was originally inserted on the register. Those sections were repealed by 6 Vict. c. 18. The 79th section of that Act enacts that at any future election the register of voters shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualification annexed to their names in the register. "Conclusive" there clearly means only for the purpose of the procedure at the election, and not with reference to subsequent proceedings; for, the proviso to the section says that it shall not be lawful for any person, in counties, to vote where he has ceased to have that qualification, and, in boroughs, where he has ceased to reside within the requisite distance. The 81st section, which provides for the questions to be put by the returning officer to the voter, omits the third question, that being already provided for by s. 79. The 7th section of the Ballot Act simply means that the persons on the register shall at the election be entitled to vote: it makes no difference in the law with respect to any subsequent proceedings as to the validity of the vote. "Entitled to vote" means entitled to vote so far as the returning officer is concerned.

With regard to the finality of the register, the 58th section of the Reform Act abolished the scrutiny by the returning officer. The 98th section of 6 Vict. c. 18 declared that there should be a right of appeal against the revising barrister's decision to the election committee, where the barrister had expressly decided as to the right to vote, and also that the committee should have a right to inquire into any vote disputed "on the ground of legal incapacity at the time of his voting under and by virtue of any statute now or hereafter to be in force, or on the ground of any other legal incapacity at the time of his voting which may have arisen subsequently to the expiration of the time allowed for making out the lists of voters:" and the section concludes by saying that, except in those cases, the register shall be conclusive. That section has been repealed by the Ballot Act, 1872: see the 4th schedule.

With regard to the second point, the receipt of parochial relief was a common law disqualification, on the ground that very poor and indigent persons were incapable of exercising an independent judgment of their own. The objects of this charity are to be "the poorest inhabitants of the tithing;" and it must be taken that those who received assistance from it were fit objects of such relief: the *Reading Case* (1): see Rogers on Election, 11th ed. p. 198; *Smith* v. *Hall.* (2) The parliamentary decisions on this subject were very conflicting. Heywood's County Elections, 2nd ed. p. 95, lays it down that the receipt of any charity which implies indigence and abject dependence may work a disqualification. This question could not have arisen before the revising barrister at all; nor that with respect to parochial relief. As to non-residence, that is a continuing disqualification. Even if it existed at the time of the registration, and the qualification was not objected to on that ground before the barrister, being continued afterwards, it was precisely like a non-residence commencing after the time of the registration, and the qualification may be objected to on a scrutiny, for the register is at most only conclusive as to the existence of a qualification at the date of it.

Thesiger, Q.C., (*W. G. Harrison* and *Couch* with him), for the respondent. The contention of the petitioner must go the length of saying that the register may in all cases be opened. If, as asserted, s. 79 of 6 Vict. c. 18, and s. 7 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), relate only to procedure at elections, then s. 98 of the former Act being repealed, and no provision substituted for it, there is no limit to the extent to which the register may be questioned upon a scrutiny, and in no case can it be final. This would seem to be a strange consequence to result from an Act which was intended to establish a system of secret voting, and to prevent a disclosure of the way in which the votes are given. It is not, however, borne out either by the language of s. 7 or by the previous course of legislation on the subject. Prior to the Reform Act, there was no system of registration: and as regarded boroughs, different franchises prevailed in different boroughs: Rogers on Elections, 11th ed. 52. So, there were different rules as to disqualification by receipt of alms or charity. This to some extent accounts for the diversity of decisions in the parliamentary committees. There seems, however, to have been a general usage as to disqualification by receipt of parochial relief within a certain period, which was fixed in the *Cricklade Case* (3) at a year. The original view of the matter appears to have been, not that such

(1) 16 Journ. 27.

(2) 15 C. B. (N.S.) 485; 33 L. J. (C.P.) 59. 9 Jur. N.S. 1340

(3) 2 Lud. at p. 365.

relief took away the franchise per se, but merely that it was evidence that the recipient was not a proper person to vote: Rogers on Elections, 11th ed. 195. The 36th section of the Reform Act now prevents registration where within the twelve calendar months previous to the last day of July there has been receipt of parochial relief or other alms which by the law of parliament now disqualifies from voting. Rogers on Elections, 11th ed. p. 199, lays it down that, in those of the old boroughs where the usage is not clear, and in all the new boroughs, it seems to be a general principle with regard to charitable foundations and endowments, these only disqualify where funds form part of the general resources for the relief of the poor and are managed by the overseers or other officers whose duty it is to provide for and pay the paupers, in the same manner as if the funds had been the produce of the parochial rates. Elliott on Registration, 2nd ed. p. 250, lays it down that by the receipt of alms the franchise is suspended, not annihilated; and that, where the usage of any borough is not clear and ascertained, the receipt of "other alms" will not affect the right of voting. No evidence was given as to any usage in Petersfield. See also Orme's Election Cases, 2nd ed. pp. 118, 122, 123. The receipt of the charity in the present case does not amount to the receipt of alms within the meaning of the parliamentary rules, for it is no evidence of the extreme indigence and dependence that would necessarily disqualify a person from exercising an independent judgment. There was nothing to shew that the small presents of clothing, &c., that were made were essential to the maintenance of the parties, though they were no doubt an acceptable boon and increased the comfort of their existence. The same might probably be said of the majority of the electors in a small agricultural borough. In the *Taunton Case* (1) it was decided that Chelsea pensioners might vote. See also the *Colchester Case.* (2)

The register was established by the Reform Act, expressly for the purpose of obviating long and expensive scrutinies. The 36th section excludes from the register persons who in the twelve months previously to the last day of July have received parochial relief or alms; and the 68th section, which provides for a scrutiny,

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(1) 2 Doug. Elec. C. at p. 373.

(2) 1 Peck. at p. 510.

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enacts that the committee may inquire into the correctness of the revising barrister's decision as to any voter improperly inserted or omitted. In the *Rochester Case* (1), it was held by an election committee that, under the Reform Act, the residence need only have been up to registration, but that loss of the qualification after registration was fatal to the vote: The *Worcester Case* (2); the *Horsham Case.* (3) The view taken by the election committees was, that, where the barrister had expressly decided, they would sit as a court of appeal from his decision, but not in cases where no objection had been raised before him: Rogers on Elections, 166. As regarded personal incapacities arising after registration, they would hear the objection, and, if satisfied that the party was disqualified, interfere. Then came 6 Vict. c. 18, which, by s. 79, altered the law in boroughs as to loss of qualification and non-residence after the 31st of July. Rogers on Elections, 10th ed. p. 554, states the effect of that Act to be that continued residence is necessary after the 31st of July, but that, in boroughs, whether a voter change his qualification or lose it wholly or in part, he will still be entitled to vote, provided he has resided during the year the register is in force, and his vote cannot be objected to before an election committee on that ground. The 98th section made the committee a court of appeal from the revising barrister wherever he had given an express decision, and also in cases of incapacity by statute or any other incapacity subsequent to registration. In other cases of incapacity the register was final, unless the objection was made before the barrister. It was held, on that Act, that an objection on the ground of infancy not taken before the revising barrister could not be taken before the committee: *New Windsor Case.* (4) The committees, however, made a distinction between such an incapacity and that where a person was prohibited from voting by statute under a penalty: see *Monmouth Case* (5), and *Rochester Case* (6), where it was held that an objection that the voter had been in the employ of the Customs within twelve months of the election might be taken before a committee, though no objection was made to him before the revising barrister. The words in the proviso to the 7th section are, "prohibited from voting by any statute or by the common law of parliament," which are not used in any other Act on the subject. Nothing is said about legal incapacity.

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(1) Kn. & O. 83, 109, 112.
(2) Kn. & O. 237, 240.
(3) Kn. & O. 270, 271.
(4) Kn. & O. 160.
(5) Kn. & O. 415.
(6) Kn. & O. 105.

With respect to the question whether parochial relief before the 31st of July can be made the ground of objection on a scrutiny, it was held in the *Rochester Case* (1) that it would not; see also *Cooper* v. *Harris* (2); *Pownall* v. *Hood.* (3)

Unless the party is entitled to vote at the time of the revision, it is the duty of the revising barrister to strike him off the register: 6 Vict. c. 18, s. 40: Elliott on Registration, 2nd ed. p. 343. The same question in substance was raised in *Rendlesham* (*Lord*) v. *Haward.* (4) A peer of Parliament is absolutely disqualified from voting: *Beauchamp* (*Earl*) v. *Madresfield.* (5)

At the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the franchise was in 10*l.* occupiers who should have resided within the borough or within seven miles thereof for six months next previous to the last day of July: 2 Wm. 4, c. 45, s. 27. By the proviso (since repealed) in s. 79 of 6 Vict. c. 18, continued residence to the time of polling was required. By the Act of 1867, s. 3, the occupation franchise is given to every man who has, on the last day of July in any year, and has during the whole of the preceding twelve calendar months, been an inhabitant occupier as owner or tenant of any dwelling-house within the borough. In the *Oldham Case* (6), Blackburn, J., ruled that the proviso as to residence under 6 Vict. c. 18, was continued under the new Act, and therefore a person who had ceased to reside between the time of registration and the time of the election was disqualified. In the *Coventry Case* (7), as to the effect of 6 Vict. c. 18, s. 98, in preventing the election judge from going into cases of non-residence, Willes, J., said: "The 6 Vict. c. 18, s. 98, enacts that the committee (now the election judge) may inquire into and decide upon the cases of persons who have been objected to before the revising barrister, and as to whom he has pronounced an express decision; if no objection has been taken, and he has pronounced no express decision, the committee, or the judge sitting here, cannot even on a scrutiny go into the question of qualification. But, if an objection could not have been made before the revising barrister, then in respect of such an objection arising afterwards, it appears to me that it comes within the expression 'legal incapacity at the time of his voting,' which may be inquired into by an election committee, or now by a judge. And such was the decision in the *Cambridge Case*" (1),—a decision in which the learned judge expresses his concurrence. In the *Oldham Case* (2) Blackburn, J., ruled that minors and aliens could not be struck off unless objected to before the revising barrister, but that a woman might be, and also persons receiving pecuniary relief after the time of registration.

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(1) Kn. & O. 120.

(2) 7 M. & G. 97.

(3) 11 C. B. 1.

(4) Ante, p. 252.

(5) Law Rep. 8 C. P. 245.

(6) 1 O'M. & H. 157.

(7) 1 O'M. & H. at p. 107.

[LORD COLERIDGE, C.J. I do not quite follow the distinction between infants and women.]

In truth there is none. The case of a borough constable is provided for by 19 & 20 Vict. c. 69, s. 9; and in the *Bewdley Case* (3) the vote of such a one was struck out by Blackburn, J. The case of a revenue officer was provided for by 22 Geo. 3, c. 41: see May's Constitutional History, vol. 1, pp. 288, 289: and there was a similar provision as to police-magistrates and constables in 10 Geo. 4, c. 44. The 11th section of 30 & 31 Vict. c. 102 is pointed at persons employed as paid canvassers at elections.

By s. 79 of 6 Vict. c. 18, the register is to be "conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at the election;" and s. 7 of 35 & 36 Vict. c. 33, enacts that "every person whose name is on such register shall be entitled to demand and receive a ballot paper, and to vote," provided he is not prohibited from voting by any statute or by the common law of parliament. It is said that this applies to procedure only. Now, ss. 1 and 2 of the last-mentioned Act come under the heading "Procedure at elections;" but ss. 5 to 7 are headed "Amendment of law." Under s. 7 a man cannot vote un-

(1) Wolf. & D. 45.

(2) 1 O'M. & H. at p. 159.

(3) 1 O'M. & H. at p. 175.

less he is on the register: the correlative is, that, if he is on the register, he shall be entitled to receive a ballot paper, and to vote. The word "prohibited" in the latter part of the clause is a new expression. Take the case of a pauper, under s. 36 of the Reform Act. He is no more prohibited from voting than is a person not qualified or whose qualification has ceased. None of the alleged disqualifications enumerated in the special case are prohibited by statute or by the common law of parliament. Being on the register, there is no prohibition against any of those parties voting. In Rogers on Elections, 10th ed. p. 179, it is said: "Persons who are or who have been obliged to depend within a certain time wholly or in part on eleemosynary assistance have been held by Whitelocke and other writers to be disqualified by the common law, not only because from their indigence they were unable to contribute to the wages of their members, but because from their dependent situation their voices were no longer free. But the receipt of alms was only considered as evidence of inability, which evidence might be rebutted by circumstances; and the franchise was considered as suspended, not annihilated." The same is laid down in Elliott on Registration, 2nd ed. p. 250. If placed on the register, persons disqualified on this ground are entitled to vote, and have constantly exercised that right. Sect. 36 only disentitles such persons to be registered. Statutable disqualifications are those which subject the party disqualified to a penalty or a prosecution for misdemeanour for having voted. As to prohibition by the common law, that would apply to the case of peers (as to which see the Resolutions of Parliament (1) referred to in Elliott, p. 261), aliens, infants, women, lunatics, or persons convicted of certain crimes.

Giffard, Q.C., in reply. *Hermitage's Case* (2) shews the distinction between the qualification of a voter and the conditions which are necessary to be observed by him in order to have his name inserted in the register. Here, as in *Goodman's Case* (3), it was held to be no objection to the vote of a registered person that he had ceased at the period of the election to reside within seven miles of the place where the poll for the city was taken previously to the passing of the Reform Act. But, in *Harper's Case* and *Stock's Case* (1), inhabitant householders who had left their houses after registration, but before the election, and went into lodgings, were struck off upon a scrutiny. So, in *Barker's Case* (2), receipt of alms between the time of registration and the time of polling was held to come within the jurisdiction of the committee. It is a mistake to assume that the object of registration was to get rid of the scrutiny. The whole question was very ably and elaborately discussed by Mr. Harrison in the *Bedford Case.* (3) The Ballot Act was not intended to alter the existing law, but merely to regulate the procedure, as did s. 79 of 6 Vict. c. 18, still leaving the vote subject to be impeached on any legal ground before the election judge. The register is to be conclusive on the returning officer; but not conclusive upon a scrutiny. Giving, therefore, the fullest effect to s. 7 of the Ballot Act, all the persons whose votes are mentioned in the case as objected to ought to be struck out.

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(1) Also referred to in *Earl Beauchamp* v. *Madresfield* (*Overseers*), Law Rep. 8 C. P. 245.

(2) Kn. & O. 83.

(3) Kn. & O. 257.

LORD COLERIDGE, C.J. No doubt is entertained by any member of the Court as to what our decision upon this special case ought to be: but, the subject being one of importance, we think it better that our reasons should be given in writing.

Cur. adv. vult.

June 23. LORD COLERIDGE, C.J. This is a case stated for the opinion of this Court by my Brother Mellor, who tried the Petersfield election petition. The petitioner was to be entitled to the seat if,—1, the register is not conclusive as to the right to vote on the part of all or some of the voters who voted for the sitting member, or,—2, if some of those voters come within the proviso of the 7th section of 35 & 36 Vict. c. 33.

The case was argued before us with remarkable learning and clearness, by Mr. Giffard and Mr. Thesiger; and I may, I hope, be permitted to thank them for the great help they have afforded the

(1) Per. & K. 142, 143.
(2) Cockb. & R. 71.
(3) Cockb. & R. 37, 48.

Court in arriving at a conclusion. A very natural result of an argument so complete and exhaustive was, to narrow materially the disputable ground, and to reduce the matters for decision to very few. We come at last to the true construction of the 7th section of the Ballot Act, and to the question whether upon the right to vote of all, or, if not upon the right of all, upon the right of which of the voters whose votes are impugned by this petition, the register of electors is or is not conclusive.

The history of legislation on the subject of the register seems to me, when accurately stated, to be practically decisive of this case. There was no register before the first Reform Act, in 1832; and, after the various provisions for revising and completing the register both in counties and boroughs, the 2 Wm. 4, c. 45, enacts in terms sufficient to imply its conclusiveness, in s. 54, that it "shall be deemed *the register of electors to vote*" for members of either counties or boroughs. By the 58th section of that Act, three questions, and three only, were allowed to be put at the time of polling, as to the right of any person to vote,—1. as to the identity of the voter; 2. as to his having already voted; 3. as to his still retaining the qualification for which his name stood in the register. The 60th section provided for the election committees retaining some part of their control over questions as to the qualification of voters, and allowed the correctness of the register to be impeached in any case in which the revising barrister had, in the opinion of the committee, improperly decided. There were, indeed, no direct and affirmative words making the register conclusive; but the practical effect of the provisions of the Reform Act was, with slight exceptions, to make it so.

But the Registration Act, 6 & 7 Vict. c. 18, went much further. It enacted in s. 79 that, "at every future election for a member or members to serve in Parliament for any county, city, or borough, the register of voters so made as aforesaid shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at such election: Provided always that it shall not be lawful for any person to vote at any election for a member or members for any county, where the qualification annexed to the name of such person shall have appeared annexed to his name in the preceding register, and such person on the last day of July in the year in which such register so in force was formed shall have ceased to have such qualification, or shall not have retained so much thereof as would have entitled him to have had his name inserted in such register: Provided also, that no person shall be entitled to vote at any future election for a member or members to serve in Parliament for any city or borough, unless he shall, ever since the 31st day of July in the year in which his name was inserted in the register of voters then in force, have resided, and at the time of voting shall continue to reside, within the city or borough, or place sharing in the election for the city or borough, in the election for which he shall claim to be entitled to vote, or within the distance thereof required by the said recited Act (1) to entitle such person to be registered in any year." And the 81st section enacts that, "in all elections whatever of a member or members to serve in Parliament for any county, &c., or for any city or borough in England or Wales, or the town of Berwick-upon-Tweed, no inquiry shall be permitted at the time of polling as to the right of any person to vote, except only as follows, that is to say, that the returning officer or his respective deputy shall, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions, or either of them,—'1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county, &c.?—2. Have you already voted, either here or elsewhere, at this election for the county?'" &c.

It enacted in the 98th section as follows, amending the 60th section of the Reform Act, which I have already read: "It shall and may be lawful for any such committee (2) to inquire into and decide upon the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have voted in such election, or, not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such register, or inserted therein, or expunged or omitted therefrom, by the express decision of the revising barrister who shall have revised the lists of voters from which such register shall have been formed; and also, that it shall and may be lawful for such committee to inquire into and decide upon the right to vote of any person who, being upon such register, shall have voted in such election, so far as the same may be disputed on the ground of legal incapacity at the time of his voting, under and by virtue of any statute now or hereafter to be in force, or on the ground of any other legal incapacity at the time of his voting, which may have arisen subsequently to the expiration of the time allowed for making out the list of voters from which the register of voters in force at the time of such election shall have been formed; but that, except in such cases and on such grounds as aforesaid, the register of voters in force at the time of such election shall, so far as regards the proceedings before such committee, be final and conclusive to all intents and purposes as to the right to vote in such election of every person who shall be upon such register."

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(1) 2 Wm. 4, c. 45, s. 33.

(2) The select committee appointed for the trial of a petition complaining of an undue election or return.

So stood the law at the time of the passing of 30 & 31 Vict. c. 102; and the argument addressed to us by Mr. Giffard was in substance this:—Before the Reform Act, the returning officer, from the very necessity of the case, was allowed, and indeed obliged, to hold a scrutiny of the voters at the time of the poll. The creation of a register put an end to this necessity. The returning officer's power of asking questions was accordingly limited as the Reform Act and subsequently the Registration Act limited it. But the conclusiveness of the register enacted by these Acts had reference only to the returning officer and to the time of the actual election, and, at all events, except so far as these enactments made it so, it was not conclusive. Then came the Representation of the People Act, 1867; and by the 3rd, 4th, 5th, and 6th sections of that Act new franchises were created. In all these sections the words are the same. The persons possessing the respective qualifications are enacted to be respectively "entitled to be registered as voters, and, when registered, to vote." This Act, it is said, pursues the same line of legislation; it makes the register conclusive on the returning officer at the time of voting, but it goes no farther. This was followed by the Ballot Act, 35 & 36 Vict. c. 33, which repeals the 58th and 60th sections of the Reform Act, the 98th section of the Registration Act, and the provisoes to the 79th section of the same Act, and enacts affirmatively in the 7th section, as follows: "At any election for a county or borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot-paper, and to vote: Provided that nothing in this Act shall entitle any person to vote who is prohibited from voting by any statute or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting."

It contemplates a possible scrutiny, it is said, by the expression "on a scrutiny," in the 25th section, and clearly for the opening of the register, by the expressions of the 41st rule. The effect of the Ballot Act, it was contended, was, by repealing the 98th section of the Registration Act and the 60th section of the Reform Act, to remove from the Statute Book the provisions which made the register conclusive; and the 79th section, as it applied only when it was first enacted to the procedure at elections and affected only the returning officer, so such was its only effect now; and the 7th section of the Ballot Act is to be read, in the same manner, as applying only to procedure at elections, and by its proviso practically leaving open the inquiry into any voter's vote, which, although it may be on the register, is capable of being impeached on any legal ground.

The argument is ingenious, but, I think, untenable. From the Reform Act to the Ballot Act, the tendency of legislation has been to make, with certain exceptions, the register conclusive. There is nothing in the words "at" or "in" "any election" (for, both prepositions are used), to limit the enactments to the time of polling only; and, although it is true that the 58th and 60th sections of the Reform Act and the 98th section of the Registration Act have been repealed, the enacting part of the 79th section of the Registration Act has been carefully kept in force; which is the more remarkable, because the provisoes to that section which insist on the retention of certain incidents of the qualification up to the time of voting are expressly repealed.

No answer has been given to the question, and probably no answer could be given to it, what effect is to be ascribed to this 79th section of the Registration Act, beyond and other than the 7th section of the Ballot Act, if both these sections have to do with procedure only. The retention of the earlier section would be useless if the 7th section of the Ballot Act makes the register only conclusive on the returning officer.

I think the true construction of these sections, which alone remain, is, to make the register conclusive not only on the returning officer, but also on any tribunal which has to inquire into elections, except in the case of persons ascertained by the proviso. These are, "persons prohibited from voting by any statute or by the common law of Parliament."

I do not think that these words are pointed at any of the cases which my Brother Mellor has referred to us. The receipt of alms, —supposing the alms in this case to be such as to disqualify;— the receipt of parochial relief; non-residence within the proper distance of the borough; non-occupation; insufficient qualification: none of these things appear to satisfy the words of this proviso. It does not mean persons who from failure in the incidents or elements of the franchise could be successfully objected to on the revision of the register: it means persons who from some inherent or for the time irremoveable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors. Such, for example, are peers, whether of the United Kingdom or of Scotland or of Ireland, women, persons holding certain offices or employments the subjects of statutory prohibitions, and persons convicted of crimes which disqualify them from voting. I do not say this list is exhaustive. It is enough to give examples of the cases in which I think the register would be still open. In all the cases referred to us by my Brother Mellor I think it is not open; and I answer the questions put by him in the 12th paragraph of the case by saying that I think none of the votes there referred to ought to be struck out and disallowed.

Both my learned Brothers who were present at the argument of this case concur generally in this judgment; but I alone am responsible for the reasons.

KEATING, J. Having had an opportunity of reading and considering the judgment just pronounced by my Lord, it remains for me only to say that I entirely concur in it.

GROVE, J. I also have read and considered my Lord's judgment, and I agree in the conclusion he has arrived at, and in the reasons which he has given.

Judgment for the respondent.

Agent for petitioner: *F. L. Soames, for J. Soames, Petersfield.*

Agents for respondent: *Rogerson & Ford, for Albery & Lucas, Midhurst.*

MEMORANDUM.

Costs of Rules for Prohibition to the Lord Mayor's Court, London.

IN pursuance of the intimation given by the Court in *Robinson* v. *Emanuel* (1), that they would in future, in virtue of their general jurisdiction over their officers, order the costs of a rule for a prohibition to be paid by the plaintiff's attorney in every case in which the action had been improperly brought in the Lord Mayor's Court in respect of a cause of action not arising within the jurisdiction of that Court, the costs were, on the 12th of June, 1874, ordered to be paid by the respective attorneys for the plaintiffs in several cases.

NOTE.—The case of *Fowler* v. *Lock*, reported Law Rep. 7 C. P. 272, was taken on appeal to the Court of Exchequer Chamber. After hearing the argument, the Court (Bramwell, B., Pigott, B., Quain and Archibald, JJ., and Amphlett, B.) took time to consider their judgment. On the 16th of June, Bramwell, B., delivered judgment, stating that the Court were divided in opinion on the point of law raised, some members of the Court holding that the relation between the

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(1) *Ante*, p. 414.

defendant and plaintiff was that of master and servant, some that it was that of bailor and bailee: that those of the latter opinion did not, however, think that it necessarily followed, under the circumstances, that the bailment involved a warranty that the horse bailed was fit for the purpose for which he was bailed, but thought that the plaintiff might have taken on himself the risk with respect to his fitness; and that the case on appeal stated the facts so imperfectly as to this latter question, that the only course under the circumstances was to order a new trial, in order that it might be submitted to a jury. The Court therefore ordered a new trial, and no judgment was delivered on the questions of law raised in the argument with respect to the relation between the parties. & see for furth proceedgs L.R. 10 C.P. 90.

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APPROPRIATION OF PAYMENT—*Secured Debts—Accounts rendered—Liability of Surety.*] The presumption, that, where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation, may be rebutted by circumstances of the case shewing that such could not have been the intention of the parties. The plaintiffs, a discount company, were in the habit of discounting bills for S. In consideration that the plaintiffs would advance money to a certain amount to S. on the deposit of a lease of S.'s premises, the defendant guaranteed any part of the money so advanced that might remain due after the realisation of the leasehold security, the guarantee to last for a period not exceeding two years. Advances were made to S. by the plaintiffs in accordance with the guarantee, and a great number of other transactions by way of further advance upon the discount of bills by the plaintiffs for S. took place in the usual course of business between them. Within two years from the date of the guarantee, S. failed, owing to the plaintiffs an amount exceeding the sum guaranteed. A long debtor and creditor account was kept by the plaintiffs of their transactions with S. during such time, including the advances made under the guarantee. The aggregate of the items on both sides of the account very largely exceeded the amount of the sum guaranteed. In this account the practice was to credit S. with the amount of the bills discounted, less discount and commission, and debit him with the amount of the bills if they were dishonoured. Many of the bills discounted were renewed at maturity, and the same system of crediting and debiting applied to the renewals. The account was balanced on several occasions before S. failed, and shewed balances against S. of much less amount than the sums advanced under the guarantee, but these balances were arrived at by crediting S. with the amount of outstanding bills, many of which were not paid at maturity, and were included in the ultimate balance against S. Bills were discounted with the plaintiffs by S. to cover advances made under the guarantee, and were from time to time renewed but never were paid. Bills, discounted by S. with the plaintiffs after the advances under the guarantee, had been paid to an amount exceeding the sum guaranteed, but it did not appear that in point of fact the balance really due from S. to the plaintiffs after the date of the guarantee was ever less than the sum guaranteed. In an action on the guarantee to recover the moneys advanced under it:—*Held*, that, under the circumstances of the case, it could not have been the intention of the plaintiffs and S., by the mode in which the account between them was kept, that the advance under the guarantee should be considered as satisfied by the items of credit therein, and consequently that the action was maintainable. *Henniker* v. *Wigg* (4 Q. B. 792) followed. City Discount Company *v.* McLean [692

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—— Stating case - - - - 508
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See Preliminary Expenses.

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See Executor de son Tort.

"AT OWNER'S RISK"—*Railway Company—Common Carrier—Special Contract—Negligence.*] Goods contained in several packages were delivered to a railway company at Chester to be carried to Halifax, under a contract note which expressed that they were to be carried "at owner's risk." Several of the packages were delayed, through the negligence of the company, for, as the jury found, an unreasonable time, and their contents were in consequence damaged:—*Held*,—upon the authority of *Robinson* v. *Great Western Ry. Co.* (35 L. J. (C.P.) 123),—that the special terms of the contract did not absolve the company from responsibility for these consequences, notwithstanding that the goods were to be carried at a lower rate than the ordinary rate. D'Arc *v.* London and North Western Railway Company [325

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BANKER—*Forged Indorsement of a Cheque made payable to Order—16 & 17 Vict. c. 59, s. 19.*] The 19th section of 16 & 17 Vict. c. 59, which protects the banker upon whom a cheque is drawn against the forgery of the indorsement of the person to whose order it is made payable, does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement. Ogden *v.* Benas - - - 513

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—— *Edwards* v. *Comte* (Law Rep. 7 C. P. 517) discussed - - - - 96
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—— *Harris* v. *Scaramanga* (Law Rep. 7 C. P. 481) followed - - - 460
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—— *Hawkins* v. *Carr* (Law Rep. 1 Q. B. 89) followed - - - - 688
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—— *Hendricks* v. *Australasian Insurance Co.* (Law Rep. 9 C. P. 460) followed - 460
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—— *Henniker* v. *Wigg* (4 Q. B. 792) followed
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—— *James* v. *Lichfield* (Law Rep. 9 Eq. 51) followed - - - - 196
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—— *Lea* v. *Whitaker* (Law Rep. 8 C. P. 70) discussed - - - - 107
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—— *Re Eady* (6 Dowl. 615) followed - 347
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—— *Re Peppercorn* (Law Rep. 1 C. P. 473) discussed - - - - 13
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—— *Withers* v. *Reynolds* (2 B. & Ad. 882) followed
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COMPENSATION UNDER LANDS CLAUSES ACT—*Arbitration—Lands Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 18)—*Compensation—Power to state Special Case—Reference by Consent—Common Law Procedure Act,* 1854 (17 *&* 18 *Vict. c.* 125), *s.* 5.] An umpire appointed in an arbitration to settle the amount of compensation under the Lands Clauses Consolidation Act, 1845, has no power to state a special case for the opinion of the Court.—Where the parties to an arbitration as to amount of compensation under the Lands Clauses Consolidation Act agree in the course of the arbitration to certain deviations from the procedure directed by the Act, they do not thereby render the reference one by consent within the meaning of the Common Law Procedure Act, 1854, s. 5, so as to enable the umpire to state a special case. RHODES *v.* AIREDALE DRAINAGE COMMISSIONERS - - - - 508

COMPOSITION—*Imprisonment for Debt—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5—*Composition with Creditors—Bankruptcy Act,* 1869 (32 *&* 33 *Vict. c.* 71), *s.* 126—*Default in Payment of Composition—Revival of Creditor's original Rights and Remedies.*] A judgment having been recovered against the defendant for a sum of money and remaining unsatisfied, the plaintiff applied to a judge at Chambers to commit the defendant to prison under the 5th section of the Debtors Act, 1869. The judge made an order for the payment of the debt by monthly instalments. After three of such instalments had been paid, proceedings were taken by the defendant for the purpose of making a composition with his creditors under the 126th section of the Bankruptcy Act, 1869; and a resolution of the creditors was duly passed accepting a composition upon the defendant's debts, payable by two instalments. Default was made in the payment of the first instalment of the composition to the plaintiff, and instalments under the judge's order having by that time become due and not having been paid, the plaintiff applied again at Chambers for the committal of the defendant to prison for non-compliance with the judge's order:—*Held,* that the effect of the default in payment of the composition was to remit the plaintiff to the position he occupied before the proceedings in respect of the composition took place, and that, consequently, the order might be made for the defendant's committal to prison for non-compliance with the judge's order.—*Edwards* v. *Coombe* (Law Rep. 7 C. P. 519), and *Slater* v. *Jones* (Law Rep. 8 Ex. 186), discussed. NEWELL *v.* VAN PRAAGH - 96

COMPOSITION—Joint debtors—Release - 216
See EQUITABLE SET-OFF.

COMPOSITION FOR RATES - - - 257
See VOTE FOR PARLIAMENT. 3.

CONSIDERATION FOR CONTRACT—*Contract—Consideration — Acceptance of Tender.*] The plaintiffs advertised for tenders for the supply of stores for a period of twelve months. The defendant sent in a tender to supply the stores required for the period named, at certain fixed prices, "in such quantities as the company's store-keeper might order from time to time:" and the plaintiffs accepted his tender:—*Held,* that there was a sufficient consideration for the defendant's promise to supply the goods, although there was no binding contract on the part of the company to order any. GREAT NORTHERN RAILWAY COMPANY *v.* WITHAM - - - 16

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CONTRACT BY CORPORATION—*Corporation—Board of Guardians—Contract not under Seal—Engagement of Servant—Clerk to the Master of a Workhouse.*] The contract for the engagement of a clerk to the master of a workhouse by a board of guardians must, in order to bind the guardians, be under their seal. AUSTIN *v.* GUARDIANS OF BETHNAL GREEN - - - 91

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CORPORATION—Contract—Common seal - 91
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CORPORATION FOR PUBLIC PURPOSES—*Negligence—Liability to repair Towing-path.*] The defendants were a corporate body, in whom were vested, by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), certain powers and authorities for the preservation and improvement of the stream, bed, and banks of the upper part of the Thames, including all powers and authorities before that Act vested in the commissioners appointed for the purposes of the upper navigation of the Thames under earlier statutes. From these statutes it appeared that there were originally towing-paths on the river banks, the owners of which took tolls for the right of passing along them, and that by such statutes the commissioners had extensive powers of supervision and control over the towing-paths and of regulating the toll to be taken. They subsequently acquired by the statutes power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation; and by the Act of 28 Geo. 3, c. 51, s. 6, were authorized themselves to take toll for, amongst other things, the towing-paths purchased or hired by them. By 35 Geo. 3, c. 106, ss. 18, 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing-path throughout the navigation, and to purchase land for that purpose. By the Thames Navigation Act, 1866, the defendants were authorized to take tolls and apply their funds to the expenses of the repair of the works vested in, acquired by, or constructed by them under the Act, and to the carrying into execution of the purposes of that Act and of the former Acts.—In consequence of a part of the towing-path on the upper navigation of the Thames being out of repair and giving way, some horses of the plaintiff which were engaged in towing a barge fell into the river and were drowned. The defendants had, in pursuance of the powers vested in them in 1866, made a parol arrangement with the owner of the soil of the towing-path at the place in question for the use of such towing-path, at an annual rent. Some parts of the towing-path along the river had been artificially constructed by and belonged to the defendants, and the use of the whole of the remainder had been acquired by them. They were in the habit of taking an aggregate toll for the use of the whole of the navigation and towing-path at Teddington Lock, which they had done in the present instance. The plaintiff having brought an action against the defendants for negligence in not keeping the towing-path in repair:—*Held* (by Blackburn, Quain, and Archibald, JJ., and Bramwell, B., Cleasby, B., dissenting), affirming the judgment of the Court below, that even assuming that no obligation was cast upon the defendants by their statutes to repair parts of the towing-path not constructed by or vested in them, so long as they kept the towing-path open and took toll for its use, they were under an obligation to those whom they invited to use it to take reasonable care either to see that the towing-path was in such a state as not to expose those using it to undue danger, or to give due warning against such danger, and that no distinction could be made in this respect between such parts of the towing-path as were natural and such as were artificial. Winch *v.* Conservators of the Thames Ex. Ch. 378

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See County Court Appeal.

COUNTY COURT APPEAL—*Notice of Appeal—Time for Execution of Bond*—13 & 14 *Vict. c.* 61, *s.* 14.] A plaint was heard in a county court on the 13th of June, but no judgment was pronounced until the 11th of July, when the judge gave his reasons at great length. After several abortive attempts to obtain a copy of the judgment, the attorney for the unsuccessful party on the 20th of July sent a notice of appeal with the names of sureties, and asked for an appointment for the appellants and the sureties to attend to execute a bond. The registrar appointed Thursday, the 24th of July, at 4 p.m. The appellants and one surety attended, but the other surety did not attend, neither was the attorney there with the bond. On the 26th the appellants' attorney sent a bond to the office, with an intimation that the parties would attend to execute it on Monday, the 28th. They did so attend: but, the registrar being absent, a clerk in the office directed them to attend again on the 30th, when the registrar would be there. They all accordingly attended on the 30th, and the bond was executed:—*Held*, that,—assuming that the 24th of July would under the circumstances have been in time,—the execution of the bond on the 30th was not a compliance with s. 14 of 13 & 14 Vict. c. 61; and the Court ordered the case to be struck out.—The Court in a subsequent term refused to re-open the matter, upon affidavits shewing that the registrar,—upon whose affidavit the Court had mainly relied,—had made a mistake, and that in truth all the parties had attended to execute the bond on the day which had been assumed to be the proper day. Francis *v.* Dowdeswell - 423

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COUNTY VOTE—Parliament - 233, 243, 252
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COVENANT RUNNING WITH REVERSION 145
See Recognition of Tenancy.

COVENANT TO REPAIR—*Landlord and Tenant—Breach—Measure of Damages.*] In 1807 a lease was granted to F., containing a general covenant to repair, a covenant to repair within *three* months after notice, and a proviso for re-entry for breach. The plaintiffs, the assignees of the lessee, in 1868 granted an underlease to the defendant with similar covenants, except that the notice was to be a *two* months' notice. In September, 1872, the premises being out of repair, the reversioner served on the premises a notice to repair pursuant to the terms of the lease of 1807. The defendant not having complied with this, the plaintiffs, on the 20th of March, 1873, served him with a notice "to repair the premises in accordance with the terms of his lease;" and, being threatened by the reversioner with proceedings to enforce a forfeiture, they entered and did the required repairs themselves, and before the expiration of two months after their notice brought an action against the defendant upon the covenants in his lease:—*Held*, that they were not entitled to recover substantial damages on the general covenant, the premises not being out of repair at the commencement of the action; nor could they sue on the special covenant, the action being brought too soon; as the defendant, being no party to the lease of 1807, was not bound by the earlier notice of September, 1872. Williams *v.* Williams - - - - - 659

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DEMAND—Rent—Forfeiture - - 48
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DEMAND OF RENT—*Landlord and Tenant—Proviso for Re-entry for Non-payment of Rent—Demand of Payment.*] An agreement of tenancy contained the following clause:—This agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, and without any other warrant, authority, or proceedings, to re-enter, &c.:—*Held*, that, to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, and a demand (but without the formalities of a common law demand) of payment be then made. A demand within the twenty-one days is insufficient. Phillips *v.* Bridge 48

DEPOSIT—Election petition—Return - 117
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DISCHARGE OF GOODS—*Shipping—Construction of Bill of Lading—Usage of the Port of London as to the Discharge of Goods from Steamers in the Docks.*] Goods were shipped under a bill of lading in these terms:—"Shipped in good order and conditioned by Petrocochino Brothers, of Calcutta, in the steamer *Zeno*, bound for London, sixty-nine bales hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid port of London," &c., "on payment of freight," &c.—On her arrival in London the *Zeno* went into the Victoria Docks, and notice was given to the consignees that she was ready to unload. The custom of the Victoria Docks as to the unloading of steamers was proved to be as follows:—The goods are taken from the deck of the vessel by the company's servants and placed on the dock quay, or, if perishable, under sheds, and, if the consignee or his agent does not appear to claim them within twenty-four hours, they are warehoused by the company. If the consignee or agent sends a lighter, they are put into the lighter from the quay by the servants of the company. The expenses of landing the goods and putting them into lighters are paid by the shipowner, but, if the goods are warehoused, this is done at the expense of the owner of the goods.—Within the proper time the consignees of the sixty-nine bales sent a lighter for them. The whole sixty-nine were proved to have been landed by the company's servants and placed on the quay; but the evidence failed to satisfy the jury that more than sixty-eight were put into the lighter. The other bale was never traced:—*Held*, that the shipowner was not responsible for the missing bale. Petrocochino *v.* Bott - - 355

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—— Parliament—Expenses - - 720
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—— Parliament—Striking off vote - 610
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ELECTION EXPENSES — *Parliament* — *Election Petition—Expenses of Preparations for an Election under the Ballot Act*, 1872—*Refusal of Returning Officer to nominate a Candidate—Reform Act*, 2 *Wm.* 4, *c.* 45, *s.* 71—*Ballot Act*, 35 *&* 36 *Vict. c.* 33, *ss.* 1, 8.] The expenses of carrying into effect the provisions of the Ballot Act, 1872 (35 & 36 Vict. c. 33), are to be borne in the first instance by the returning officer, and to be apportioned between and recovered by him from the several candidates.—The pre-payment of or security for the estimated amount of such expenses cannot be insisted upon by the returning officer as a condition precedent to his putting the candidate in nomination.—Where, therefore, the returning officer refused to nominate one of two candidates on the ground that he declined to submit to such a demand, the return of the other candidate was upon a special case declared void. Davies *v.* Lord Kensington - - - - 720

ELECTION, MUNICIPAL—Particulars of bribery
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EQUITABLE SET-OFF — *Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 72), *ss.* 49, 50, 125, 126—*Effect of Release by Composition of One of Two Joint Debtors—Equitable Set-off—Evidence of Trust.*] All the three forms of proceeding in the case of an insolvent debtor, contained in the Bankruptcy Act, 1869, viz. by an adjudication of bankruptcy under s. 6, a liquidation by arrangement under s. 125, and a composition under s. 126, are (though different in form) "proceedings in bankruptcy."

EQUITABLE SET-OFF—*continued.*

The general enactments, therefore, in ss. 49 and 50 apply to all discharges under the statute, and consequently an order of discharge in each of the three cases operates only to release the debtor in whose favour it is given, leaving his solvent co-debtor still liable to be sued separately by a joint creditor who has been a party to the release of the insolvent debtor.—Megrath sued Gray for 64*l.* 8*s.* 11*d.* for money lent, &c.; and Gray sued Megrath to recover a balance due in respect of two unpaid acceptances of Megrath and his former partner, one Highton, for 249*l.* 19*s.* 1*d.* and 167*l.* 7*s.* respectively, both of which became due in 1870.—In the first action, the defendant (Gray) pleaded an equitable set-off, alleging that, before the accruing of the causes of action, the plaintiff (Megrath) was indebted to him, that he (Gray) summoned a meeting of his creditors under s. 125 of the Bankruptcy Act, 1869, that a trustee was appointed, and that the trustee sold to him (Gray) the debt and claim due from the plaintiff to the trustee in respect of the aforesaid debt by the plaintiff to the defendant.—The equitable set-off of Gray in the first action constituted his claim in the second action, and arose under the following circumstances:—Megrath and Highton dissolved partnership in May, 1870, the latter undertaking to pay all debts of the firm and to indemnify Megrath. Amongst the liabilities of the firm were the two bills the subject of set-off in the first action, which Megrath & Highton had given to Gray for goods sold, and which Gray had got discounted by the Adelphi Bank, Liverpool. These bills were dishonoured, and Highton presented a petition for liquidation under s. 126 of the Bankruptcy Act, 1869, and by arrangement paid a composition of 10*s.* in the pound, and obtained his discharge. The Adelphi Bank received the composition.—Gray also filed a petition for liquidation under s. 125, and paid a composition of 9*s.* in the pound, and obtained his discharge, and (by agreement with the creditors) an assignment from the trustee of the debts mentioned in a schedule. The Adelphi Bank also received this composition. The schedule of debtors contained no reference to the Adelphi Bank or to the two bills in question: but evidence was received by the arbitrator who stated a special case in *Megrath* v. *Gray*, subject to objection, that Megrath's liability in respect of those bills was omitted from the schedule merely because they were considered by the trustee as of no value, and not with any intention of reserving to the trustee any right of action in respect of them. The bills were given up by the Adelphi Bank to Gray in January, 1872:—*Held*,—upon the argument of a special case in the first action, and a rule to enter a verdict for the defendant in the second action,—that, whether the right of action in respect of the unpaid balance of the two bills was at the commencement of the first action legally in Gray, or was legally in his trustee to hold in trust for him, Gray might equally maintain his equitable set-off; that the evidence objected to was properly admitted for the purpose of establishing a trust; and that the discharge of Highton did not release his co-debtor Megrath from his liability upon the bills. Megrath *v.* Gray. Gray *v.* Megrath [216

ESTOPPEL—Assignee of term - - 177
See EXECUTOR DE SON TORT.

EVIDENCE—Bribery - - - - 610
See STRIKING OFF VOTE.

—— Documents—Production—Election petition
See PRODUCTION OF DOCUMENTS. [446

—— Interrogatories—Damages - - 135
See INTERROGATORIES AS TO DAMAGES.

—— Interrogatories—Insufficient answer - 9
See INSUFFICIENCY OF ANSWER.

—— Interrogatories—Payment - - 688
See INTERROGATORIES AS TO PAYMENT.

—— Interrogatories—Valuer - - 57
See INTERROGATORIES TO VALUER.

—— Negligence—Level crossing **Ex. Ch. 551**
See EVIDENCE OF NEGLIGENCE. 3.

—— Nuisance—Damage - - - 400
See NUISANCE IN HIGHWAY.

EVIDENCE—Scienter - - - 647
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—— Subpœna duces—Non-production - 23
See PRODUCTION OF DOCUMENTS. 1.

EVIDENCE OF BRIBERY - - - 610
See STRIKING OFF VOTE.

EVIDENCE OF CONTRACT—Acceptance - 158
See ACCEPTANCE OF CONTRACT.

EVIDENCE OF NEGLIGENCE—*Railway Company—Invitation to alight—Overshooting Platform—Contributory Negligence.*] On the approach of a train to a station, a porter called out the name of the station, and the train was brought to a standstill. Hearing carriage-doors opening and shutting, and seeing a person alight from the next carriage, the plaintiff (a season-ticket holder accustomed to stop there) stepped out of a carriage; but, the carriage in which he was having overshot the platform, he fell on to the embankment and was hurt. It was night, and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the driver intended to back the train:—*Held*,—upon a reservation in which it was agreed that the Court should "be at liberty to draw inferences both as to negligence by the defendants and want of reasonable care of the plaintiff, and upon the facts generally,"—that there was evidence from which a jury might reasonably find negligence on the part of the company's servants, and no evidence of contributory negligence on the part of the plaintiff. WELLER *v.* LONDON, BRIGHTON, AND SOUTH COAST RY. CO. - - - 126

2. —— *Metropolis Local Management Act*, 18 & 19 *Vict. c.* 120—*Liability of Vestry or Local Board for Injury resulting from insufficient Cleansing of Sewers.*] In the absence of negligence on their part, a vestry or local board is not responsible for any injury resulting to an individual from the disrepair of a sewer.—Sect. 72 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) imposes upon the vestry or local board the duty of properly cleansing the sewers vested in them by the Act. Under the premises of the plaintiff was an old drain which by reason of other houses draining into it had become a "sewer." This drain having become choked, the soil therefrom flowed into the cellar of the plaintiff, a publican, and did damage. In an action against the vestry, founded upon a breach of the duty imposed upon them by s. 72, but not charging negligence, the jury found that the existence of the drain was unknown to the defendants; that its existence might have been known to them by the exercise of reasonable care and inquiry; but that the obstruction of the drain was unknown to the defendants, and could not by the exercise of reasonable care have been known to them:—*Held*, that, upon these findings, the defendants were entitled to the verdict; and that the declaration disclosed no cause of action. HAMMOND *v.* VESTRY OF ST. PANCRAS - - - 316

3. —— *Railway Company—Level Crossing.*] A public footway crossed a railway on a level. The plaintiff, while crossing on the footway in the evening, after dark, was knocked down and injured by a train of the defendants on the crossing. He stated in evidence at the trial, that he did not see the train until it was close upon him; that he saw no lights on the train and heard no whistling. He stated also, that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called on behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in the defendants' employ also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross.—The judge at the trial ruled that there was evidence to go to the jury of negligence on the part of the defendants which caused the injury to the plaintiff:—*Held*, on a bill of exceptions, by Bramwell, B., Mellor, J., Pollock and Amphlett, BB. (Cockburn, C.J., and Cleasby, B., dissenting), that there was no evidence of negligence to go to the jury. ELLIS *v.* GREAT WESTERN RY. CO. - - - 551

EVIDENCE OF SCIENTER - - - 647
See FEROCIOUS DOG.

EVIDENCE OF TRUST - - - 216
See EQUITABLE SET-OFF.

EVIDENCE TO VARY WRITTEN CONTRACT
See FRAUDS, STATUTE OF. [311

EXECUTOR—Assignee of term - - 177
See EXECUTOR DE SON TORT.

EXECUTOR DE SON TORT—*Assignee of Term.*] In 1810 a lease for 61¼ years was granted by the predecessors in title of the plaintiffs to one "H. G., his executors, administrators, and assigns." In 1814 H. G. died intestate. His widow administered to his effects, and remained possessed of the lease till her death, in 1843. After her death, G. S. Heales (the father of the defendant), who had married a daughter of H. G., without any administration took possession of the premises and received the rent, paying the ground-rent; and he continued to do so until his death, in 1856.—After the death of G. S. Heales, the defendant received the rent of the premises, and, after paying the ground-rent, handed over the balance to

EXECUTOR DE SON TORT—*continued.*
his mother, conceiving her to be entitled to it. He also from time to time let the premises.—After the death of his mother the defendant continued to receive the rent of the premises, paying the ground-rent, and dividing the balance between his two sisters and himself,—no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to the plaintiffs out of repair :—*Semble*, that the defendant was executor de son tort of the term; But, *Held*, that, beyond all doubt, he had estopped himself from denying that he was assignee. Williams *v.* Heales - - - - - - 177

FACTOR—Agent intrusted - - - 470
See Factors Acts.

FACTORS ACTS—*Agent "intrusted with the Possession of Goods," within* 5 & 6 *Vict. c.* 39—*Agent a Warehouse-keeper as well as a Broker.*] To constitute a person "an agent intrusted with the possession of goods," within the Factors Acts, he must be intrusted with them in the character of such agent, that is, for the purpose of sale. If, besides the character of agent, he also carries on an independent business as a warehouse-keeper, goods intrusted to him for the purpose of warehousing them are not "intrusted" to him as agent within the meaning of the Acts.—One Slee carried on the business of a wool-broker at Liverpool, and also that of a warehouse-keeper. In this latter capacity he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for wools, with directions to warehouse them and await instructions as to the disposal of them. These wools consisted of both sheep's and goats' wool. Slee was not a goats' wool broker; and, as to the sheep's wool, he sold it only under specific instructions sent to him by the plaintiffs in respect of each transaction.—Having wools of the plaintiffs' of both descriptions in his warehouses (but not having received any specific instructions to sell either), Slee pledged both with the defendants, bankers, for a loan, giving them a letter undertaking to hold the wools as trustee for them :—*Held*, that Slee was not "an agent intrusted with the possession" of the wools, within the true meaning of the Factors Acts. Cole *v.* North Western Bank - - - 470

FALSA DEMONSTRATIO—*Description of Subject-matter of Agreement—Liquidated Damages.*] The plaintiff entered into an agreement for the transfer of his tenancy in a public-house, and the sale of the goodwill thereof to the defendant. The subject-matter of the agreement, which was in writing, was therein described as "the house and premises he now occupies, known by the sign of the 'White Hart.'" There was a coach-house which belonged to the "White Hart," and which, at the time of the making of the agreement, was not in the occupation of the plaintiff, but of one S., who held it as tenant to the plaintiff for a period which had not expired at the time fixed for the completion of the transfer by the agreement. The agreement contained a variety of stipulations with regard to the transfer of the licences, the payment of rates and taxes, and the purchase of fixtures, furniture, and stock at a valuation by the defendant, and concluded as follows: "If either party shall refuse or neglect to perform all and every part of this agreement, they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of 100*l.* as damages, and recoverable in any of Her Majesty's courts of law." The defendant refused to perform the agreement on the ground that it included the coach-house, and that the plaintiff could not perform his part, not being able to deliver up possession of that portion of the premises on the day fixed for completion, and the plaintiff accordingly brought his action to recover the 100*l.* as liquidated damages:—*Held*, that the words "he now occupies" formed an essential part of the description of the subject-matter of the agreement, and could not be rejected as falsa demonstratio, and consequently that the agreement did not include the coach-house and the plaintiff was entitled to succeed; but that the 100*l.* was not liquidated damages but a penalty, and therefore the plaintiff could only recover the damages found by the jury to have been actually sustained by him. *Reilly* v. *Jones* (1 Bing. 302) and *Lea* v. *Whitaker* (Law Rep. 8 C. P. 70), discussed. Magee *v.* Lavell - 107

FALSA DEMONSTRATIO—*continued.*

FEROCIOUS DOG—*Evidence of Scienter.*] In order to fix the defendant with knowledge of the ferocious nature of a dog of which he was the owner, and which had bitten the plaintiff, two persons who had upon previous occasions (one of them twice) been attacked by it were called to prove that they had gone to the defendant's public-house and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid. There was, however, no evidence that these complaints were communicated to the defendant; nor was it shewn that either of the two men spoken to had the general management of the defendant's business or had the care of the dog:—*Held*, by Lord Coleridge, C.J., and Keating J. (Brett J., dissenting), that there was evidence of scienter to go to the jury. Appleby *v.* Percy - 647

FOOD—Adulteration - - - - 499
See Adulteration of Food.

FORFEITURE—Rent—Demand - - 48
See Demand of Rent.

FORGED INDORSEMENT—Cheque - 513
See Banker.

FOREIGN ATTACHMENT—Mayor's Court 418
See Lord Mayor's Court. 2.

FOREIGN AVERAGE STATEMENT—*Marine Insurance—Construction of Policy—"To pay Losses on Dutch Terms"—Foreign Statement of Average.*] Sugars were insured from Java to Holland by an English policy which contained this clause, "To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt:' to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland." There was already a policy effected in Holland on the same goods; but of this the

FOREIGN AVERAGE STATEMENT—*continued.* English underwriters had no notice, except so far as it could be implied from the above words. On her voyage to Holland the vessel took the ground under circumstances which would amount to a stranding according to English, but not according to Dutch, law; and a Dutch average stater (a particular average loss having been incurred) made up a statement of average, which statement it was admitted was properly made up according to the facts and according to the law of Holland:—*Held*, that the terms of the policy sued on did not amount to notice to the defendants of an existing Dutch policy, and therefore it was to be construed as if it stood alone, and according to English law: But *Held*, that by the latter words of the clause, the defendants were bound to pay according to the foreign average statement, and consequently that the plaintiff was entitled to recover. Hendricks *v.* Australasian Insurance Company - - - - - 460

2. —— *Marine Insurance—"General Average as per foreign Statement"—"Warranted free from Average unless general"—Voyage broken up before Arrival at Port of Destination.*] A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term, "general average as per foreign statement." The ship after starting from Varna met with heavy weather, and was forced to carry a great press of canvas to avoid a lee shore. This caused her to strain very much, and having sprung a leak, and become otherwise disabled, she was brought into the port of Constantinople. Proceedings were taken in the Consular Court of Constantinople by the owner of the vessel, and a survey was made of the ship by direction of that Court. It was found that a fifth part of the wheat had been damaged, and the surveyors recommended that the voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. An order of the Court to that effect was accordingly made, and an adjustment of average in respect of ship and cargo was also made by order of the Court at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. In an action on the policy by the owners of the wheat the defendants paid into Court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the damage to the wheat, which, under the circumstances, by the law of England would not be a general average loss:—*Held*, on a special case stated in the action, by which the Court were to draw inferences of fact, that the Consular Court of Constantinople had jurisdiction to make the order which they made, and that the voyage was necessarily brought to an end at Constantinople, and that under these circumstances the defendants were bound by the average statement at Constantinople, and were liable to the plaintiffs in respect of the damage to the wheat. *Harris* v. *Scaramanga* (Law Rep. 7 C. P. 481) and *Hendricks* v. *Australasian Insurance Co.* (ante, p. 460) followed. Mavro *v.* Ocean Marine Insurance Company - - - - - 595

FRANCHISE—Register—Conclusiveness of 734
See Register of Electors.

FRAUDS, STATUTE OF—*Sale of Goods—Alteration of Written Contract by Parol.*] A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made certain interlineations in red ink altering the terms, and having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood:—*Held*, in an action on a contract in the last-mentioned terms against the purchaser, that, notwithstanding the provisions of the Statute of Frauds, parol evidence was admissible to shew that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to shew what was the condition of the document when it became a contract between the parties. Stewart *v.* Eddowes. Hudson *v.* Stewart - - - - - 311

FREEMAN—Borough vote - - 273
See Vote for Parliament. 1.

FREIGHT—Prepayment - - Ex. Ch. 559
See Prepayment of Freight.

"FROM SIX TO EIGHT WEEKS"—*Construction of Mercantile Contract—Credit of "from six to eight Weeks."*] On a sale of goods, the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks;" and they found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:—*Held*,—upon the authority of *Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 530),—that the question was properly left to the jury, and the verdict right. Ashforth *v.* Redford - 20

GAME—Inclosure—Reservation Ex. Ch. 524
See Right of Sporting.

GOODS, SALE OF—Breach—Rescission - 208
See Rescission of Contract. 1.

GUARDIANS OF POOR—Contract Ex. Ch. 373
See Lunatic.

—— Contract—Seal - - - 91
See Contract by Corporation.

HOLDING OVER—Implied tenancy - 681
See Notice to quit.

HOUSE-AGENT—*Right to Commission on Sale of a Lease "through his intervention."*] The plaintiffs, house-agents, were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on the plaintiffs' books, and they gave a few cards to view.—One U., who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at the plaintiffs' office and obtained a card to view the premises in question, amongst others, the terms being written by the plaintiffs' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price asked (2200*l.*) too high, and he went away. U. had no further communication with the plaintiffs; but he subsequently renewed his negotiation with a friend of the defendant's, and ultimately became the purchaser of the lease for 1700*l.*;—*Held*, that there was evidence for a jury that U. had become the purchaser of the premises "through the plaintiffs' intervention," and consequently that the plaintiffs were entitled to the stipulated commission.—At the trial the judge put the following question to U.:—"Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house?" and, overruling an objection by the defendant's counsel, received his answer, which was, "I should think not:"—*Semble*, that the answer was properly received. Mansell *v.* Clements - 139

HUSBAND AND WIFE — Acknowledgment by wife - - - - - 347
See Acknowledgment by Married Woman.

—— Wife's property - - - 580
See Married Woman's Property Act, 1870.

INCLOSURE ACT—Game—Reservation
See Right of Sporting. [Ex. Ch. 524

INDORSEMENT—Cheque—Forgery - 513
See Banker.

"INHABITANT" - - - - 261
See Vote for Parliament. 4.

INJUNCTION—Bankruptcy Court - - 668
See Injunction by Bankruptcy Court.

INJUNCTION BY BANKRUPTCY COURT—*Bankruptcy—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72—*Injunction by County Court to restrain Proceedings in a Vice-Admiralty Court abroad—Prohibition.*] Sect. 72 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts that "every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case";—*Held*, that this section gives any court of bankruptcy jurisdiction to determine as matter of fact the expediency or necessity for entertaining and deciding any question which affects the realisation and distribution of the property of the bankrupt,—subject only to the appeal given to the chief judge in bankruptcy and the Court of appeal in Chancery by s. 71.—Therefore, where a judge of a county court had "deemed it expedient" to restrain a person trading in London from enforcing in a Vice-Admiralty Court abroad a claim of lien on a ship (part of the bankrupts' estate) for necessaries supplied abroad on the orders of the captain after the filing of the petition, and to direct an issue to try the matter in his court, this Court refused to grant a prohibition,—holding that the county court had by its decision given itself jurisdiction, subject only to appeal.—*Semble*, per Brett, J., that the matter was not one which a county court having no Admiralty jurisdiction ought to have entertained. Halliday *v.* Harris [668

INSOLVENCY—Breach of contract - 588
See Rescission of Contract. 2.

INSUFFICIENCY OF ANSWER—*Interrogatories—Insufficient Answer—Oral Examination of Party—Irrelevant Matter—Common Law Procedure Act*, 1854, *s.* 53.] The answers to interrogatories may be insufficient within the meaning of the Common Law Procedure Act, 1854, s. 53, by reason of containing, in addition to the information asked for, impertinent or otherwise objectionable matter. Peyton *v.* Harting - - 9

INSURANCE, MARINE—Average statement [460, 595
See Foreign Average Statement. 1, 2.

—— Description of voyage - - **Ex. Ch. 518**
See Restraint of Princes.

—— Freight—Partial loss - - **Ex. Ch. 559**
See Prepayment of Freight.

—— Restraint of princes - - **Ex. Ch. 518**
See Restraint of Princes.

INTERROGATORIES—Damages - - 135
See Interrogatories as to Damages.

—— Insufficient answer - - - 9
See Insufficiency of Answer.

—— Payment - - - - 688
See Interrogatories as to Payment.

INTERROGATORIES AS TO DAMAGES—*Practice—Interrogatories—Payment into Court.*] Where the defendant's object is to pay money into court in satisfaction of the plaintiff's cause of action, he will be allowed to interrogate the plaintiff as to the particulars of the damage sustained by him. Horne *v.* Hough - - - - 135

INTERROGATORIES AS TO PAYMENT—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 51—*Plea of Payment to Plaintiff's Testator.*] In an action by executors against the makers of a promissory note given to the testator, the defendants pleaded, as to part of the claim, payment to the testator in his lifetime:—*Held*, upon the authority of *Hawkins* v. *Carr* (Law Rep. 1 Q. B. 89), that the plaintiffs might interrogate the defendants as to the time and place at which and the circumstances under which the alleged payment took place. Hills *v.* Wates - 688

INTERROGATORIES TO VALUER—*Practice—Common Law Procedure Act,* 1854 (17 & 18 *Vict. c.* 125), *s.* 51—*Liability of Valuer for Negligence—Arbitrator.*] The defendant was engaged as valuer on the part of the plaintiff to ascertain the sum to be paid by the latter on the purchase of the goodwill, &c., of a business. In an action against him for alleged negligence and want of reasonable skill in the conduct of the valuation:—*Held*, that the plaintiff was entitled, under s. 51 of the Common Law Procedure Act, 1854, to interrogate the defendant as to the basis of his valuation.—Distinction between an arbitrator and a mere valuer. Turner *v.* Goulden - 57

—— Valuer—Arbitrator - - - 57
See Interrogatories to Valuer.

INVITATION TO ALIGHT—Railway passenger
See Evidence of Negligence. 1. [126

IMPLIED TENANCY—Holding over - 681
See Notice to quit.

IRISH PEER—Vote for Parliament - 252
See Vote for Parliament. 6.

IRREGULARITY—Service of writs—Waiver 189
See Waiver of Irregularity.

JOINT DEBTORS—Release—Composition 216
See Equitable Set-off.

JOINT STOCK COMPANY—Preliminary expenses
See Preliminary Expenses. - [503

JURISDICTION—Bankruptcy Court—Injunction [668
See Injunction by Bankruptcy Court.

—— County Court—Injunction - - 668
See Injunction by Bankruptcy Court.

—— Mayor's Court - - - - 418
See Lord Mayor's Court. 2.

—— Pleas to - - - - 420
See Lord Mayor's Court. 5.

JUSTICES—Case stated—Question of law or fact
See "New Building." [30

LANDLORD AND TENANT—Assignee—Estoppel
See Executor de son Tort. [177

—— Covenant to repair—Measure of damage 659
See Covenant to repair.

—— Holding over—Implied tenancy - 681
See Notice to quit.

—— Mortgage—32 Hen. 8, c. 34 - - 145
See Recognition of Tenancy.

—— Rent—Demand - - - 48
See Demand of Rent.

LANDS CLAUSES CONSOLIDATION ACT, 1845 [508
See Compensation under Lands Clauses Act.

LEVEL CROSSING—Railway—Negligence [Ex. Ch. 551
See Evidence of Negligence. 3.

LIABILITY TO REPAIR TOWING-PATH [Ex. Ch. 378
See Corporation for Public Purposes.

LIBEL—Privileged communication - 393, 396
See Privileged Communication. 1, 2.

LIQUIDATED DAMAGES - - - - 107
See Falsa Demonstratio.

"LIST OF VOTERS" - - - - 233
See Vote for Parliament. 8.

LIST OF VOTES OBJECTED TO—*Corrupt Practices (Municipal Elections) Act,* 1872 (35 & 36 *Vict. c.* 60)—*Reg. Gen. Michaelmas Term,* 1872, *No.* 7—*Delivery of List of Votes objected to.*] Where a list of the votes objected to, on a petition under the Corrupt Practices (Municipal Elections) Act, is not delivered within the time prescribed by the 7th of the General Rules made under the Act, the Court has no power to allow evidence to be given against the validity of votes or to allow a list to be subsequently delivered. Neild *v.* Batty - - - - - - 104

LOCAL BOARD—Duty to cleanse sewers - 316
See Evidence of Negligence. 2.

LOCAL GOVERNMENT ACT, 1858, s. 34 - 30
See "New Building."

LORD OF MANOR—Reservation of game
See Right of Sporting. [Ex. Ch. 524

LORD MAYOR'S COURT—*Costs of Rule for Nonsuit in a Superior Court—Practice.*] Where a rule is obtained in a superior Court to enter a nonsuit in a cause tried in the Mayor's Court, London, costs of the application cannot be allowed unless asked for by the rule. Phillips *v.* Bridge [324

2. —— *Attachment—Prohibition—Judgment of the Court of Q. B.*] A judgment was obtained by the plaintiff against the defendant in China. In an action upon that judgment in the Queen's Bench here, judgment was, pursuant to a consent given by the defendant's attorneys in the city of London, signed at the Queen's Bench Office, Temple:—*Held*, that the judgment so signed was not a debt arising within the city of London, so as to give jurisdiction to the Lord Mayor's Court to attach moneys of the defendants in the hands of his attorneys there. Tapp *v.* Jones - 418

3. —— *Jurisdiction—Prohibition—Mayor's Court Procedure Act,* 20 & 21 *Vict. c. clvii. ss.* 12, 15.] The circumstance of the debt or damages being under 50*l.* does not prevent this Court from issuing a prohibition to the Lord Mayor's Court, London, where the cause of action arose without its jurisdiction. Robinson *v.* Emanuel - 414

4. —— *Jurisdiction—Prohibition—Mayor's Court Procedure Act,* 20 & 21 *Vict. c. clvii, ss.* 12, 15.] The Court, at the instance of a stranger, made a rule absolute for a prohibition to the Lord Mayor's Court, London, after verdict for the plaintiff, notwithstanding that the claim was below 50*l.*, and consequently there could be no plea to the jurisdiction. Quartly *v.* Timmins - - 416

5. —— *What admitted under a Plea to the Jurisdiction.*] A plea to the jurisdiction in an action by concessit solvere in the Lord Mayor's Court, London, by the indorsee against the acceptor of a bill of exchange made payable at a banker's in London (but not specially), admits the drawing, acceptance, indorsement, and dishonour of the bill, but not that either of them took place within the city of London. Sewell *v.* Cheetham - 420

LUNATIC—*Pauper Criminal Lunatic—Obligation of Guardians to maintain in Asylum—*3 & 4 *Vict. c.* 54, *s.* 2—*Parol Contract for Maintenance of Lunatic.*] The 2nd section of 3 & 4 Vict. c. 54,

LUNATIC—*continued.*
provides that in the case of a pauper criminal lunatic removed to an asylum, an order of justices may be made on the guardians of the union comprising the parish of the lunatic's settlement to pay a weekly sum for the maintenance of such lunatic in the asylum.—A criminal lunatic having been removed to a private asylum under a warrant of the Secretary of State, in pursuance of 3 & 4 Vict. c. 54, the guardians of the L. union, to which the lunatic was chargeable, paid to the proprietor of such asylum the sum of 16*s.* a week for the maintenance of the lunatic for fourteen years; but they subsequently gave notice to the proprietor that they should not in future pay more than 11*s.* 1*d.* a week. To this reduction he refused to assent. The lunatic continuing in the asylum, the proprietor brought his action against the guardians to recover for the maintenance of the lunatic at the rate of 16*s.* a week. It was not shewn that there ever had been an order of justices under 3 & 4 Vict. c. 54, s. 2, as to the maintenance of the lunatic:—*Held,* reversing the decision of the Court below, that it could not be inferred that the guardians had originally entered into a contract to pay for the lunatic at the rate of 16*s.* a week until she should be removed from the asylum, nor could it be presumed that an order of justices had been made under 3 & 4 Vict. c, 54, s. 2, upon the guardians to pay that sum. Pegge *v.* Lampeter Union - - - - **Ex. Ch. 373**

MARKED REGISTER—Production - 446
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See Acknowledgment by Married Woman.

—— Right to sue - - - - 580
See Married Woman's Property Act, 1870.

MARRIED WOMAN'S PROPERTY ACT, 1870—33 & 34 *Vict. c,* 93, *ss.* 1, 11—*Right of Married Woman to sue for the Protection of her Earnings, &c.*] The Married Woman's Property Act, 1870, enables a married woman to maintain an action in her own name to recover damages against her bankers for dishonoring cheques drawn by her in the course of a trade which she carries on separately from her husband, or for not duly presenting or not giving due notice of dishonor of a bill of exchange acquired by her in such trade, and intrusted to them by her for presentment,—it being a remedy "for the protection and security" of her separate property, within s. 11.—Whether she can in all cases maintain an action in her own name for a breach of contract, or for a tort, in reference to her separate trade,—*quære?* Summers *v.* City Bank - - - - - - 580

MASTER AND SERVANT—Mines—Default of servant - - - - 1
See Mines.

—— Scope of employment - - - 575
See Negligence of Servant.

MASTER OF SHIP—Authority—Necessaries 331
See Necessaries for Ship.

MASTER'S DISCRETION—Taxation of costs 410
See Taxation of Costs.

MAYOR'S COURT - 324, 418, 414, 416, 420
See Lord Mayor's Court. 1, 2, 3, 4, 5.

MAYOR'S COURT PROCEDURE ACT, ss. 12, 15
Ses Lord Mayor's Court. [414, 416

MEASURE OF DAMAGE—Covenant to repair 659
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—— Cutting off steam-power - - 145
See Recognition of Tenancy.

MERCANTILE CONTRACT—Construction 20
See "From six to eight Weeks."

METROPOLIS LOCAL MANAGEMENT ACT 316
See Evidence of Negligence. 2.

MINE-OWNER—Liability for default of servant 1
See Mines.

MINES—*Mines Regulation Act* (23 & 24 *Vict. c.* 151), *ss.* 10, 22—*Non-observance of Rules—Liability of Mine-owner for Default on the Part of his Servants—Penalty—Construction of Penal Statute.*] By the 10th section of the Mines Regulation Act (23 & 24 Vict. c. 151) it was provided that certain general rules should be observed in every coal mine by the owner and agent thereof; and among those rules was one providing that, whenever safety lamps were required to be used, they should be first examined and safely locked by a person or persons duly authorized for that purpose. The 22nd section of the Act imposed a penalty on the owner or agent if, through the default of such owner or agent, any of the general rules, the provisions of which ought to be observed by them, were neglected or wilfully violated.—The owner of a mine appointed a competent person to examine and lock the safety lamps required for use in the mine, but such person delivered out certain safety lamps to miners for use in the mine unlocked:—*Held,* that in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him. Dickenson *v.* Fletcher - - - - - 1

MINES REGULATION ACT, ss. 10, 22 - 1
See Mines.

MORTGAGOR'S MORTGAGE — Recognition of tenancy - - - - 145
See Recognition of Tenancy.

MUNICIPAL ELECTION—Petition—Particulars
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—— Petition—Striking name out - - 605
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—— Votes objected to - - - 104
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NECESSARIES FOR SHIP—*Ship and Shipping—Authority of Captain to pledge Owner's Credit—*

NECESSARIES FOR SHIP—*continued.*

Effect of Owner's having an Agent at the Port.] Where the owner of a ship had an agent at the port where she was lying, authorized and ready to supply the ship's requirements:—*Held*, that the master had no implied authority to pledge the owner's credit at such port for necessaries supplied for the ship's use. Gunn *v.* Roberts 331

NEGLIGENCE—Carrier—Special contract - 325
See "At Owner's Risk."

—— Corporation—Public purposes Ex. Ch. 378
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—— Evidence—Railway company - - 126
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—— Evidence—Sewer - - - - 316
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—— Master and servant - - - 375
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—— Mine-owner - - - - - 1
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—— Public duty—Notice of action - 62
See Notice of Action.

—— Railway company—Level crossing Ex. Ch. 551
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NEGLIGENCE OF SERVANT—*Master and Servant—Authority—Scope of Employment.*] A local board of health, being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to one B. A ditch ran between the farm and the land of the plaintiff. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon the plaintiff's land and pared away his side of the ditch, and cut down so much of the brushwood and underwood on the plaintiff's side, as impeded the flow of drainage along the ditch:—*Held*, that the acts so done by B. were not within the scope of his employment; and consequently the local board were not liable for them at the suit of the plaintiff, there being no implied authority from the board to do them. Lord Bolingbroke *v.* Local Board of Swindon New Town - 575

"NEW BUILDING"—*Local Government Act*, 1858 (21 *&* 22 *Vict. c.* 98), *s.* 34—*New Building—Statement of Case under* 20 *&* 21 *Vict. c.* 43.] A stable in a yard at the rear of the respondent's premises was pulled down, and re-erected, of smaller superficial dimensions, but somewhat higher, in another part of the same yard, the old materials with some addition, and the boundary walls of the yard, being made use of in such re-erection:—*Held*,—reversing the decision of the justices,—that this was a "new building" within the Local Government Act, 1858, and the byelaws of the local board.—*Held*, also, that the question was properly raised as a question of law for the opinion of the Court. Hobbs *v.* Dance 30

NOMINATION—Refusal by returning officer 720
See Election Expenses.

NON-PAYMENT OF RENT—Demand - 48
See Demand of Rent.

NONSUIT—Mayor's Court—Costs - - 324
See Lord Mayor's Court. 1.

NOTICE OF ACTION—*Negligence—Obstruction in navigable River—Wallasey Improvement Act*, 1864, 27 *&* 28 *Vict. c. cxvii.—Notice of Action—Negligent Omission in the Performance of a public Duty—Public Health Act*, 1848 (11 *&* 12 *Vict. c.* 63), *s.* 139.] An omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done," within the meaning of a clause requiring a notice of action.—Sect. 139 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), enacts that no writ, &c., shall be sued out against the local board, &c., "for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered," &c.—The Wallasey district was by order in council brought within the provisions of that Act, and the Wallasey local board were by various local Acts impowered to acquire and work certain ferries between Liverpool and the Cheshire side of the Mersey. By s. 2 of the Wallasey Improvement Act, 1864, it was enacted that "the Act should be executed by the local board, subject to the powers and provisions of the Public Health Act, 1848, and of the several Acts supplemental thereto, and of the Local Government Act, 1858, and of any other Act relating to the public health and from time to time in force within the district of Wallasey;" by s. 7 it was enacted that "the local board, subject to the provisions in this Act and in the Acts wholly or partially incorporated with this Act, may make and maintain, in the line or situation and according to the levels defined on the deposited plans and sections, and upon the lands delineated on the said plans and described in the books of reference thereto, the following works, that is to say," amongst others, "a pier or landing-stage at New Brighton, from a point at or near the east end of V. Road, together with all such jetties, esplanades, landing-places, toll-gates or bars, and other works and conveniences in connection therewith, as the local board shall from time to time think fit:" and s. 8 enacted that, "previously to commencing the pier or landing stage or the works connected therewith, the local board shall deposit at the Admiralty Office plans, sections, and working drawings of the said pier or landing-stage and works connected therewith for the approval of the Lord High Admiral," or the commissioners of the Admiralty, "such approval to be signified in writing under the hand of the secretary of the Admiralty, and such pier or landing-stage and works shall be constructed only in accordance with such approval."—In supposed pursuance of the Act of 1864, the board proceeded to erect and place a pier or landing-stage at New Brighton, the pier consisting of a permanent structure built of timber and iron partly on the land and partly upon piles screwed into the foreshore down to low-water mark, and of a floating stage in the river, which rose and fell with the tide, and was connected with the pier by a bridge one end of which was attached to the floating stage and the other to the end of the pier. This was done with the consent and approval of the Admiralty and the Mersey conservators. The whole of the permanent structure was within the lines of deviation marked on the deposited plans; but the floating

NOTICE OF ACTION—*continued.*

landing-stage was beyond those limits.—The floating landing-stage was kept in position by means of chains stretching from either end to the shore, and by other chains attached to anchors fixed by permission in the bed of the Mersey. To mark the spot where the anchors lay, buoys composed of blocks of timber were placed; but these were at certain times of the tide drawn under the surface of the water.—A steam-tug of the plaintiffs, whilst lawfully and properly navigating the Mersey, struck upon the stock or arm of one of the anchors, and was damaged. On a special case stated by an arbitrator for the opinion of the Court (who were to draw inferences of fact), it was found that "the defendants, in doing what they did, acted in the bonâ fide belief that they were acting under the powers given them by their Act of 1864 and the Acts incorporated therewith;" that they were not guilty of any negligence in the mode of laying down the mooring anchors; but that they "were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides, so as properly and efficiently to indicate the position of the anchor below:"—*Held*, that the board were authorized by the Wallasey Act of 1864 in constructing and placing the pier, landing-stage, and anchors where they did; and that, upon the finding of the arbitrator, they had been guilty of negligence in not sufficiently buoying the anchor so as at all times of the tide to indicate to persons navigating the river the spot where it lay; but that they were entitled to a notice of action under s. 139 of the Public Health Act, 1848,—that provision being brought down and made applicable to the Wallasey Act of 1864 by s. 2 of that Act; and the omission sufficiently to buoy the anchor being "an act done" by them with a bonâ fide belief that they were exercising the powers conferred upon them by the last-mentioned Act. Jolliffe *v.* Wallasey Local Board - - - 62

NOTICE OF APPEAL - - - - 423
See County Court Appeal.

NOTICE OF DISQUALIFICATION—*Parliament—Election Petition—Disqualification, Notice of—Votes thrown away.*] There being two candidates at a parliamentary election, one of them was guilty of a corrupt practice by giving leave, on the day of nomination, to his tenants to kill rabbits on his estate, for the purpose of influencing their votes at the election. A notice was given to the electors on the morning of the polling-day before the polling, by the agent of the other candidate, in the following terms: "Colonel D. having, for the purpose of influencing voters at this election, given to all his tenants on the Warrington estate and voters in this borough a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice, and as agent of H. C. D., Esq., a candidate at this election, I hereby give you notice that, under these circumstances, the said Colonel D. is disqualified from being a candidate, and that all votes given for him will be thrown away." Colonel D. obtained the majority, and was declared elected, but, being petitioned against, was unseated, on the ground of the above-mentioned corrupt practice. The petitioner claimed the seat on the ground that the votes given to the respondent being given with knowledge of his disqualification, were thrown away, and consequently the petitioner was in a majority:—*Held*, that bribing by a candidate at an election, though it renders his election void if he be found guilty of it on petition, does not incapacitate the candidate at that election in the sense that the votes given for him by voters with knowledge of it will be thrown away, and that no disqualification arises in that sense of the term until after the candidate has been found guilty of bribery on petition, and consequently, that the petitioner was not entitled to the seat. Drinkwater *v.* Deakin [626

NOTICE OF INCUMBRANCE—*Vendor and Purchaser—Sale of Real Property—Incumbrances—Terms of existing Tenancies, Notice of.*] Part of an estate consisted of three farms in Hampshire, and in that county valuations between outgoing and incoming tenants for hay, straw, and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements from year to year, according to the custom of Hampshire. In April, 1868, the defendants, who were devisees of the estates on trust for sale, gave notice to the tenants to quit at Michaelmas, 1869, but the tenants alleged that they had been promised leases by the devisor, and ultimately it was agreed that if they would give up possession according to the notices, the half year's rent due at Michaelmas, 1868, should be remitted to them, and they should be entitled at the termination of their tenancies to be paid for hay, &c., at "market value."—In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents; and certain incumbrances, subject to which the sale was made, were specified, viz., land-tax and tithe rent-charge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale nor should any compensation be allowed, and that the rents or possession should be received or retained, and the outgoings discharged by the vendors up to the 29th of September, and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract for sale, which was written on a copy of the above-mentioned particulars and conditions, described the property purchased as the property mentioned in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time the plaintiff bought he had no knowledge of the above-mentioned agreements with the tenants.—Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay the tenants market instead of fodder value for

NOTICE OF INCUMBRANCE—*continued.*

the hay, straw, and manure.—The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and now sought to recover the difference between that and fodder value from the vendors:—*Held*, that upon the true construction of the contract of sale there was nothing to shew that the farms were to be conveyed free from the claim of the tenants to be paid at market value; but that the contract was to convey, subject to the existing tenancies, of which the agreements to pay market value formed terms, and that upon the authority of *James* v. *Lichfield* (Law Rep. 9 Eq, 51), notice to the plaintiff of the tenancies was notice to him of all the terms of such tenancies, and consequently that the action was not maintainable. Phillips *v.* Miller 196

NOTICE OF OBJECTION—Service - - 233
See Vote for Parliament. 8.

NOTICE TO QUIT—*Landlord and Tenant—Tenant permitted to continue in Possession (without express Stipulation) after the Expiration of his Landlord's Lease.*] Premises were let by the owner in fee on a lease expiring at Midsummer, 1866. The lessee underlet to the defendant on a lease from year to year commencing at *Michaelmas.* The defendant was in possession at Midsummer, 1866 (when the lease of his immediate lessor came to an end), and the owner in fee granted a new lease to the plaintiff as from that time. The defendant, who continued to occupy the premises, paid the plaintiff a sum equal to a quarter's rent on the terms on which he had held the premises, as for rent from Midsummer to Michaelmas, 1866, at which time the plaintiff insisted upon an increase of 5*l.* per annum on the rent, and such increased rent was thenceforth paid by the defendant. In December, 1873, the plaintiff gave the defendant a six months' notice to quit at *Midsummer*:—*Held*, by Brett and Denman, JJ. (the latter with some doubt), that the notice was bad,—the defendant having been allowed to hold over the expiration of the lease originally granted to him, without any explanation or fresh stipulation (save as to the increased rent); the inference being that there was a tacit agreement between him and the plaintiff that he should continue to hold as tenant from year to year according to his original holding, that is, as from Michaelmas to Michaelmas. Kelly *v.* Patterson - - - - 681

NUISANCE—Special damage - - 400
See Nuisance in Highway.

NUISANCE IN HIGHWAY—*Private and particular Damage to an Individual—Evidence.*] To entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must shew that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial.—The plaintiff kept a coffee-house in a narrow street near Covent Garden. The defendants carried on an extensive business as auctioneers in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from vans. The vans intercepted the light from the plaintiff's coffee-shop to such an extent that he was obliged to burn gas nearly all day, and access to the shop was obstructed by the horses standing in front of the door, and the stench arising from their frequent staleing there rendered the plaintiff's dwelling incommodious and uncomfortable:—*Held*, that the evidence disclosed such a direct and substantial private and particular damage to the plaintiff beyond that suffered by the rest of the public, as to entitle him to maintain an action.—The declaration alleged that, in consequence of the nuisance complained of, the plaintiff's premises had been rendered "unhealthy and incommodious" as well as a house of business as also as a dwelling-house:—*Held*, that evidence that the premises were rendered uncomfortable by reason of the offensive smells arising from the staleing of the horses which were kept constantly standing opposite to them, was properly admitted. Benjamin *v.* Storr - - - - 400

OBSTRUCTION OF RIGHT OF WAY—*Construction of Covenant—Easement—Right of Way—Party or Privy.*] The plaintiff purchased two of several plots of building land of which the defendant was mortgagee in fee. The conveyance, to which the defendant and the mortgagor were both parties, contained a grant of a right of way in these terms,—"Together with full and free right and liberty for the grantee, his heirs, &c., at all times and for all purposes, &c., with or without horses, carriages, &c., to pass and re-pass over and along the roads or intended roads and ways delineated in the plan," and also a covenant *by the defendant* that he had not "done, omitted, or knowingly suffered or *been party or privy* to anything whereby the premises conveyed, or any part thereof, were or might be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he was in any wise hindered from granting and releasing the same premises, or any part thereof, in manner aforesaid." Another plot had previously been sold to A. In the conveyance to A. (to which the defendant as mortgagee was a party), *the mortgagor* covenanted with A. that he would at his own expense "pave and complete and make fit for use, and at all times maintain in good repair, a private road, the site of which private road is marked 'Private Road A B' on the plan drawn in the margin of these presents (describing it), and will make such road of a width of not less than forty feet throughout its entire length." This was a road over which a right of way was granted to the plaintiff in his conveyance. In this deed was also a proviso that it should be lawful for A. "to erect and maintain a porte-cochère or projection extending over the foot-pavement of the said private road marked A B, provided that the plan thereof be submitted to the mortgagor, and approved of by him." This portico when finished projected about two feet into the carriage-way of the private road A B, but there was ample space left for the convenient enjoyment by the plaintiff of the way granted to him:—*Held*, that, there being no substantial interference with the right of way or easement granted to the plaintiff, he was not entitled to maintain an action against the defendant upon his covenant; but that, if there had

OBSTRUCTION OF RIGHT OF WAY—*continued.* been such interference with any right of the plaintiff, however small the damage, the defendant was sufficiently a "party or privy" to the conveyance to A. as to have rendered him liable. Clifford *v.* Hoare - - - - 362

OCCUPATION AS INHABITANT - - 261
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OMISSION OF PUBLIC DUTY—Negligence 62
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ORAL EXAMINATION—Interrogatories—Insufficient answer - - - 9
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PARLIAMENT—Election—Conclusiveness of register - - - - 734
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—— Election—Costs under Ballot Act - 720
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PARLIAMENTARY ELECTIONS ACT, 1868, s. 6, subs. 2 - - - - 435
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PAROL EVIDENCE—Written contract - 311
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PART OF A HOUSE - - - - 277
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PARTICULARS—Bribery - - - 165
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PARTICULARS OF BRIBERY—*Municipal Election—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60)—Particulars—Reg. Gen., Michaelmas Term, 1872, No. 6—Amendment of Petition.*] An order having been made by a judge at Chambers, under the 6th of the General Rules made under the Corrupt Practices (Municipal Elections) Act, 1872, for the delivery of particulars by the petitioners to the respondent, stating by whom, when, and where persons alleged to have been bribed and treated had been so bribed and treated, and by whom, when, and where canvassers had been employed and moneys paid for the conveyance of voters to the poll,—the order was allowed by the Court, with the addition of the words "so far as known."—A petition against the election of a town-councillor cannot, after the expiration of the twenty-one days limited by s. 13, subs. 2, for its presentation, be amended by the introduction of a substantially new charge.—The petition as originally framed complained of the employment, contrary to the prohibition contained in s. 7, as paid canvassers, at an election for the north ward of the borough, of persons who were on the register of burgesses for *that ward.* The petitioners after the expiration of the twenty-one days sought to amend the petition by adding "and other wards:"—*Held,* that the Court (or a judge) had no power to allow the proposed amendment. Maude *v.* Lowley - - - - - 165

"PARTY OR PRIVY" - - - 362
See Obstruction of Right of Way.

PASSENGER—Invitation to alight - - 126
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PAUPER CRIMINAL LUNATIC—Maintenance
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—— Interrogatories - - - - 688
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PAYMENT INTO COURT—Interrogatories 135
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PETITION—Election—Production of documents
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—— Election—Time for filing - - 435
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—— Municipal election—Particulars - 165
See Particulars of Bribery.
—— Municipal election—Striking out name 605
See Striking Name out of Petition.
—— Municipal election—Votes objected to 104
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"PLACE"—*Unlawfully using a "Place" for the Purpose of Betting, within 16 & 17 Vict. c. 119, s. 3.*] The appellant was on a race-course standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when open was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." The defendant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him, and for which he gave a ticket:—*Held,* that the appellant was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, and was properly convicted thereof under 16 & 17 Vict. c. 119, s. 3. Bows *v.* Fenwick - - 339

PLEA TO JURISDICTION - - - 420
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PLEADING—Set-off of debt of agent - 38
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POOR LAW—Criminal lunatic - Ex. Ch. 373
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—— Guardians—Contract - - - 91
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PRACTICE—County Court appeal - - 423
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—— Election petition—Abatement - 117
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—— Election petition—Documents - 446
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—— Election petition—Time for filing - 435
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—— Interrogatories—Answer - - 9
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—— Interrogatories—Damages - - 135
See Interrogatories as to Damages.

—— Interrogatories—Payment - - 688
See Interrogatories as to Payment.

—— Interrogatories—Valuer - - 57
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—— Mayor's Court—Costs - - - 324
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—— Municipal election petition - - 605
See Striking Name out of Petition.

—— Subpœna duces—Non-production - 23
See Production of Documents. 1.

—— Taking documents off the file - 187
See Taking Documents off the File.

PRELIMINARY EXPENSES—*Joint Stock Company—Articles of Association—Ratification.*] The articles of association of a joint stock company provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed and treated as preliminary expenses, to an amount not exceeding 2000*l.* The plaintiffs, who were promoters of the company, had incurred preliminary expenses in the establishment of the company:—*Held*, that no action would lie at the suit of the plaintiffs against the company for non-payment of such preliminary expenses in accordance with the articles of association. Melhado *v.* Porto Alegre Railway Co. - - - 503

PREPAYMENT OF FREIGHT—*Marine Insurance—Policy on Freight—Partial Loss.*] The plaintiff chartered his ship to A. for a voyage from Greenock to Bombay with a cargo of coals, freight to be paid on right delivery of cargo at the rate of 42*s.* per ton of 20 cwt. on the quantity delivered; and it was provided that such freight should be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment commission at Bombay, and the remainder on right delivery of cargo, &c. —A cargo of 2178 tons of coal was loaded, and bills of lading signed, and 2286*l.* was paid on account of freight. The plaintiff insured the freight under the charterparty, and the charterer effected an insurance on the cargo, which was expressed to be on 2178 tons of coal and increased value thereof by prepayment of freight, valued at 4500*l.*—The ship sailed, and was lost near Bombay; about half the cargo was lost, and the remainder was safely delivered to the consignees of the charterers free of freight. The plaintiff, the shipowner, sued his insurer as for a total loss of the unpaid half freight. The defendants paid into Court the half of such unpaid freight:—*Held* (by Cockburn, C.J., Mellor, J., and Amphlett, B.; dissenting, Cleasby and Pollock, BB.), reversing the decision of the Court below, that the amount of freight prepaid must be distributed over the whole of the cargo; and, consequently, the charterer was bound to pay the plaintiff half the amount of the freight remaining unpaid upon the delivery of the half cargo; that there was only a partial loss of freight, covered by the payment into Court; and the defendants were, therefore, entitled to judgment. Allison *v.* Bristol Marine Insurance Co. - - Ex. Ch. 559

PRINCIPAL AND AGENT—Commission - 139
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—— Set-off of agent's debt - - - 38
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—— Ship—Necessaries - - - 331
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PRINCIPAL AND SURETY—Appropriation of payment - - - - 692
See Appropriation of Payment.

PRIVILEGED COMMUNICATION—*Libel—Post-office Telegram.*] The transmission unnecessarily by a post-office telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege. Williamson *v.* Freer. [393

2. —— *Libel—Fair Comment on Matter of Public Interest.*] The conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in Parliament, may be made the subject of fair and bonâ fide discussion by a writer in a public newspaper, and unfavourable comments made upon such conduct in the course of such discussion are privileged. Davis *v.* Duncan - - - - 396

PRODUCTION OF DOCUMENTS—*Witness—Subpœna duces tecum—Attachment for Non-production of Documents.*] The Court refused to grant an attachment against a witness for disobedience of an order of the district prothonotary of the Court of Pleas at Lancaster, and of an arbitrator, which required the witness to produce before the latter in London a large number of books and documents belonging to a railway company in Lincolnshire of which he was the secretary and solicitor, and which the directors (who were no parties to the reference) refused to allow him to bring. Crowther *v.* Appleby - - - - 23

2. —— *Parliamentary Election Petition—Inspection of Documents—Ballot Act, 1872 (35 & 36 Vict. c. 33), sched. 1, rules 29 to 43—"Marked Register"—"Rejected Ballot Papers"—"Counterfoils of Ballot Papers."*] By rule 29 of the 1st

PRODUCTION OF DOCUMENTS—*continued.*
schedule to the Ballot Act, 1872 (35 & 36 Vict. c. 33), the presiding officer is required, at the close of the poll, to make up into sealed packets, amongst other things, "the tendered ballot papers," and "the marked copies of the register of voters and the counterfoils of the ballot papers," and to deliver such packets to the returning officer. By rule 34 the returning officer is to count and record the ballot papers and count the votes in the presence of the agents of the candidates, if desired, taking all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers. He is then to indorse "rejected" on any ballot papers which he may reject as invalid, and report the number of ballot papers rejected by him to the clerk of the Crown, and allow the agents to copy such report. Upon the completion of the counting, the returning officer is, by r. 37, to seal up in separate packets the counted and rejected ballot papers; he is not to open the sealed packet of ballot papers or marked copy of the register of voters and counterfoils, but to proceed, in the presence of the agents, to verify the ballot paper account given by each presiding officer, by comparing it with the number of ballot papers recorded by him, and the unused and spoilt ballot papers in his possession, and the tendered votes list, and to reseal each sealed packet after examination. And by r. 38 the returning officer is to forward all the packets of ballot papers, &c., in his possession, indorsing on each packet a description of its contents and the date of the election to which they relate, and the name of the county or borough.—Rule 41 provides that "no person shall, except by order of the House of Commons or any tribunal having cognizance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the clerk of the Crown;" but that "such order may be made, subject to such conditions as to persons, time, place, and mode of opening or inspection, as the House or tribunal making the order may think expedient; provided that, on making and carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid." And rule 42 provides that all documents forwarded by a returning officer in pursuance of this Act to the clerk of the Crown, other than ballot papers and counterfoils, shall be open to public inspection at such time and under such regulations as may be prescribed, and copies supplied, &c.:—*Held*, that it is competent to the Court to grant inspection and a copy of *the marked register of voters*, upon an affidavit by the agent of a petitioner that, in his judgment and belief, it is requisite for the purposes of the petition and for enabling him duly to prepare the case of the petitioner that he should be allowed to inspect the same; and this notwithstanding the marked register was contained in the same sealed packet with *the counterfoils of ballot papers.*—*Held*, per Brett, J., that the inspection should be extended to the *backs* of the "rejected ballot papers" and the "counterfoils."—*Held*, per Grove and Denman, JJ., that, assuming the Court to have power to grant inspection of the last-mentioned documents, a strong case should be made out to warrant it, and that the petitioner in this instance was not entitled to inspection.—*Semble*, per Brett, J., that the practice of granting inspection of documents under the Ballot Act should be regulated by the same rules which guide the Courts in granting inspection in ordinary cases, proper precautions being taken not to violate the secresy of voting which it was the object of the Act to insure. Stowe *v.* Jolliffe - - - 446

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PUBLIC NUISANCE—Special damage - 400
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RAILWAY COMPANY—Level crossing—Negligence - - - **Ex. Ch. 551**
See Evidence of Negligence. 3.

—— Negligence—Passenger - - 126
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RATIFICATION — Company — Preliminary expenses - - - - 503
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RECOGNITION OF TENANCY — *Landlord and Tenant—Recognition by Mortgagee of Tenancy created by Mortgagor—Sale by Mortgagee under Power—Covenants or Stipulations running with the Reversion—Stat.* 32 *Hen.* 8, *c.* 34—*Damages.*] On the 30th of June, 1872, one Bridgett, by an instrument not under seal, demised to the plaintiffs standings for three lace-machines in a room in a factory in Nottingham, the tenancy to commence on the 24th of June, the rent to be payable quarterly, the lessor to provide steam-power and to pay all rates and taxes, and the tenancy to be determinable by either party on six months' notice to expire at Midsummer. At the time of making this demise, the premises were under mortgage to a building society. Interest being in arrear, the mortgagees on the 24th of August gave notice to the plaintiffs not to pay any more rent to Bridgett, the mortgagor; and early in September, pursuant to the power contained in the indenture of mortgage, the mortgagees contracted to sell the premises to the defendant, possession to be given on the 25th of December. The conveyance, however, was not executed until the 14th of February, 1873. On the 28th of September, 1872, the mortgagees (protesting that the plaintiffs were not entitled to notice) gave them notice to give up their standings at Christmas, and in November, 1872, and February, 1873, they received from them the quarters' rent due respectively at Michaelmas and Christmas. In the meantime some conversations took place be-

RECOGNITION OF TENANCY—*continued.*
tween the plaintiffs and the defendant as to the former continuing in the factory upon altered terms; but no terms were ever agreed to, and no rent was received by the defendant. On the 24th of March, 1873, the defendant demanded possession of the portion of the factory occupied by the plaintiffs; on the 15th of May he cut off the supply of steam-power; and on the 22nd the plaintiffs brought their action:—*Held*, that the defendant was not bound by the contract between Bridgett and the plaintiffs, it not being under seal, and therefore not within the stat. 32 Hen. 8, c. 34, and consequently, in the absence of adoption by him or of some new contract of tenancy between him and the plaintiffs, not liable in this action. *Semble*, that the plaintiffs, if entitled to a verdict, would only have been entitled to damages for being deprived of steam-power from the 15th to the 22nd of May. *Semble*, that the receipt of rent by the mortgagees from the plaintiffs was as against them a recognition of a subsisting tenancy under the agreement with Bridgett. Smith *v.* Eggington - - - - - 145

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REGISTER OF ELECTORS—*Parliament—Conclusiveness of Register—Persons prohibited from voting by Statute or by Common Law of Parliament—Receipt of Alms, &c.—Reform Act* (2 *Wm.* 4, *c.* 45), *ss.* 54, 58, 60—*Registration Act* (6 *Vict. c.* 18), *s.* 79, 98—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33) *s.* 7.] Sect. 7 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), enacts that every person whose name is on the register for the time being in force "shall be entitled to demand and receive a ballot paper, and to vote,"—"Provided that nothing in this Act shall entitle any person to vote who is prohibited from voting by any statute or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting:"—*Held*, that, notwithstanding the Ballot Act has repealed ss. 68 and 70 of the Reform Act and s. 98 of the Registration Act, the register is conclusive not only on the returning officer, but also on every tribunal which has to inquire into elections, except only in the case of "persons prohibited from voting by any statute or by the common law of parliament,"—persons who from some inherent or for the time irremoveable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors; such as peers, women, persons holding certain offices or employments under the Crown, persons convicted of crimes which disqualify, or the like. The proviso is not pointed at disqualification by reason of the receipt of parochial relief or other alms since the date of the register, non-residence within the prescribed distance of the borough, non-occupation, insufficient qualification, or the like. As to these the register is conclusive, and their votes cannot be struck out by the election judge on a scrutiny. Stowe *v.* Jolliffe - 734

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RENT—Demand—Re-entry - - - 48
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RESCISSION OF CONTRACT—*Contract for Delivery of Goods in Parcels at different Times—Non-payment by Buyer for one Parcel—Refusal by Seller to deliver the Rest.*] The defendant contracted to sell to the plaintiffs 250 tons pig-iron at 56*s.* per ton, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel.—The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first 125 tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was ultimately paid:—*Held*, that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach. Freeth *v.* Burr 208

2. —— *Sale of Goods—Payment of Price—Condition precedent—Insolvency.*] Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract. *Withers* v. *Reynolds* (2 B. & Ad. 882) followed. Bloomer *v.* Bernstein - - - - - 588

RESERVATION OF RIGHT OF SPORTING
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RESIDENCE—Vote for Parliament **261, 269, 273**
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RESTRAINT OF PRINCES—*Marine Insurance—Description of Voyage—Overland Transit—Detention of Goods in besieged Town—Abandonment—Total Loss.*] In a policy of insurance on goods the voyage was thus described: "At and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London viâ Marseilles and [or] Southampton, including all risks of craft to and from the steamers," &c. The risks insured against were, amongst others, of the seas, fire, and thieves, arrests, restraints, and detainments of all kings, princes, and people, &c. In the margin of

RESTRAINT OF PRINCES—*continued.*

the policy was the following memorandum: "It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only." The goods insured were shipped from Shanghai for London by the Messageries Impériales; the practice of that company was to send such goods overland through France by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne, and thence to London; and this course of business was well known among underwriters. The goods in question arrived in Paris on their way on the 13th of September, 1870. At this time the German armies were advancing on Paris, and had seized parts of the Northern Railway, so that the goods could not be forwarded to Boulogne, and by the 19th of September they completely surrounded and besieged Paris, preventing communication between it and all other places, by reason of which it was impossible to remove the goods from Paris. This state of things continued till after the 7th of October, on which day the assured gave notice of abandonment:—*Held*, affirming the decision of the Court below, that the policy covered the overland transit from Marseilles to Boulogne; and that there was a constructive total loss by restraint or detainment of princes, within the meaning of the policy. Rodoconachi *v.* Elliott - - **Ex. Ch. 518**

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RIGHT OF SPORTING—*Inclosure Act—Game—Reservation of Rights of Sporting to Lord of Manor.*] An inclosure Act directed the commissioners appointed thereby to allot to the lady of the manor, her heirs, and assigns, a certain proportion in value of the lands to be inclosed in lieu of, and as a full compensation for, the right and interest of such lady of the manor in and to the soil of the said lands, and to allot the residue amongst the other persons entitled to rights of common; and it was enacted that the several allotments should be vested in the allottees respectively in full bar and satisfaction of all rights of common and other rights and interests whatsoever in, over, and upon the said lands (except such manorial rights as were thereinafter reserved to the lady of the manor, her heirs and assigns); and that all rights of common should cease over the said lands. The reservation clause provided that nothing in the Act contained should prejudice the right, title, or interest of the lady of the manor, her heirs and assigns, in or to the seigniory or royalties incident or belonging to the manor; but that she might hold and enjoy all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons or deodands, &c., royalties, jurisdictions, franchises, matters, and things whatsoever to the said manor, or to the lord or lady thereof incident or belonging, or which had been theretofore held and enjoyed by the lady of the manor or any of her ancestors (other than and except such common right as could or might be claimed by the said lady of the manor as owner of the soil and inheritance of the said commons or waste grounds):—*Held* (by Cockburn, C.J., Bramwell, B., Mellor, J., and Amphlett, B.; dissenting, Cleasby and Pollock, BB.), affirming the decision of the Court below, that the Act did not reserve to the lady of the manor the right of shooting which she formerly possessed over the lands allotted under the Act by virtue of her ownership of the soil. Sowerby *v.* Smith - **Ex. Ch. 524**

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SERVICE OF ARTICLED CLERK—*Attorney and Solicitor—Articled Clerk—Service under Articles—Office or Employment other than under Articles—23 & 24 Vict. c. 127, s. 10.*] An articled clerk held during the term of his articles the office of vestry clerk. It was shewn that the duties of the office had not interfered with the due performance of his duties under his articles or with his legal studies:—*Held*, nevertheless, that he had contravened the provisions of 23 & 24 Vict. c. 127, s. 10, by holding an office or employment other than that of clerk to the attorney to whom he was articled.—*Re Peppercorn* (Law Rep. 1 C. P. 473) discussed. Re Greville - - - 13

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SET-OFF OF DEBT OF AGENT—*Principal and Agent—Set-off against Principal—Pleading—Means of Knowledge.*] In order to constitute a valid defence within the rule in *George* v. *Clagett* (7 T. R. 359), the plea should shew that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued.—

SET-OFF OF DEBT OF AGENT—*continued.*
It is not necessary in such a plea to negative "means of knowledge," that the seller was dealing as an agent.—To a count for goods sold and delivered, the defendants pleaded, that the goods were sold and delivered to them by S., then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that S. sold the goods in his own name and as his own goods with the consent of the plaintiffs; that, at the time of the sale, the defendants believed S. to be the owner of the goods, and did not know that the plaintiffs were the owners of or interested therein, or that S. was agent; and that, before the defendants knew that the plaintiffs were the owners of the goods or that S. was agent in the sale thereof, S. became indebted to the defendants, &c., claiming a set-off. —Replication, that, before the sale by S., the defendants had the *means of knowing* that he was merely apparent owner of the goods and that the same were intrusted to him as agent, and that S. was agent, and as such sold the goods to the defendants:—*Held*, that the plea was good, and the replication no answer to it. Borries *v.* Imperial Ottoman Bank - - - - - 38

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—— Equitable—Bankruptcy - - 216
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See Warranty of Seaworthiness.

SIEGE—Detention of goods - Ex. Ch. 518
See Restraint of Princes.

SLANDER—*Words not Actionable in themselves—Special Damage.*] A statement false and malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably under some circumstances, and at the hands of some persons, suffer damage, will not, even though damage has resulted in fact, support an action for defamation.—A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "He was the ringleader of the nine hours system," and "He has ruined the town by bringing about the nine hours system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system at L.," whereby the plaintiff was prevented from obtaining employment in his trade at L.:—*Held*, that, the words not being in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained. Miller *v.* David - - - - - 118

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11 & 12 Vict. c. 63, s. 139 - - 62
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—— —— s. 51 - - - - - 688
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18 & 19 Vict. c. 120 - - - - 316
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20 & 21 Vict. c. 43 - - - - - 30
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29 & 30 Vict. c. 89 - - - **Ex. Ch.** 378
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30 & 31 Vict. c. 102, ss. 2, 61 - - 277
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32 & 33 Vict. c. 71, ss. 49, 50, 125, 126 - 216
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STEAMER—Discharge of goods - - 355
See Discharge of Goods.

STRIKING NAME OUT OF PETITION—*Municipal Election—Petition—Striking out Respondent's Name—Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *ss.* 17, 18.] At a municipal election, A. and B. were candidates for the office of town councillor. A. obtained a majority of thirty-five votes over B., and was declared elected, but, being disqualified, refused to serve. B. thereupon claimed to have been elected, and having made the requisite declaration, acted on several occasions as town councillor. A petition being presented under the Corrupt Practices (Municipal Elections) Act, 1872, to which both A. and B. were made respondents, they both gave notice, under s. 18 of the Act, of their intention not to oppose the petition. No notice of A.'s disqualification was given to the electors before the election. On an application by B. to the Court that his name might be struck out of the petition:—The Court refused the application on the ground that he was properly made a respondent. Yates *v.* Leach 605

STRIKING OFF VOTE—*Parliament—Election Petition—Scrutiny—Bribery—Striking off Votes—Ballot Act* (35 *&* 36 *Vict. c.* 33), *s.* 25—*Voter “so bribed”—Primâ facie case—Evidence.*] At the trial of an election petition it was proved that P., one of the candidates, had, through his agent, been guilty of a corrupt practice under the following circumstances. About the 2nd of December, 1873, he declared himself and was accepted by the Liberal party as a candidate for a borough at the next general election. About the end of December, he determined to make a distribution of coals among the poor of the borough, and such distribution was effected as follows. Persons were sent round to the houses of those who were thought likely to accept a gift of coals, to ask if they were willing to accept a bag of coals from Mr. P., and those who replied in the affirmative received a ticket or order upon a coal merchant for coals. P.'s political agent acted in the distribution, and the tickets were signed by him, and were indorsed with the words, “With Mr. P.'s compliments.” In many cases the persons selected as donees were voters who were not objects of charity, some of them being small shopkeepers, and others 10*l.* householders. The number of voters so receiving coal bore a very large proportion to the whole constituency. P.'s agent intended by the distribution of coals so made to influence the votes of the donees, and several of the persons who acted in the distribution of tickets canvassed the electors for P. A dissolution occurring in January, P. stood for the borough, and, having been elected, was petitioned against by a rival candidate, and the petitioner claimed the seat. The above facts were proved at the trial of the petition, and none of the voters who had received the coals having been called in opposition to the petitioner's case, it was contended on his behalf, on a scrutiny, that, under the 25th section of the Ballot Act, 1872, a vote must be struck off the poll of the sitting member for every voter who received such coals, whether he had acted corruptly in receiving them or not: it was likewise contended that even if the true construction of the section required that the voter should have received the coal corruptly, the above facts constituted a primâ facie case of corruption against the voters, upon which, in the absence of evidence in rebuttal, the votes might be struck off. The election judge reserved the question whether these contentions were correct for the Court:—*Held*, upon a special case

STRIKING OFF VOTE—*continued.*
stated by the election judge, by Lord Coleridge, C.J., Brett and Grove, JJ. (Brett, J., doubting), that there was a primâ facie case of corrupt practices against the voters, in the absence of any explanation by them, sufficient to justify their votes being struck off, and that the petitioner was entitled to the seat upon a sufficient number of such votes being struck off to put him in a majority.—Per Lord Coleridge, C.J., and Brett J. The vote can only be struck off under the 25th section of the Ballot Act when the voter has acted corruptly. MALCOLM *v.* PARRY - 610

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SUBPŒNA DUCES TECUM—Non-production of documents - - - - - 23
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SURETY—Payment—Appropriation - 692
See APPROPRIATION OF PAYMENT.

TAKING DOCUMENTS OFF THE FILE—*Practice.*] Certain documents relating to the shipment of goods at Bombay having been returned annexed to a commission issued to that place for the purpose of taking evidence in an action brought in this Court upon a policy of insurance on part of the goods so shipped, and a mandamus having issued for the examination of witnesses in an action brought in the Court of Exchequer upon a policy on other goods alleged to have been shipped on board the same vessel, on the execution of which writ the same documents would be required for the purpose of identification or otherwise,—application was made to this Court for leave to take them from the office for the purpose of their being sent out to Bombay with the mandamus. The Court refused the application, inasmuch as the case in this Court was sub judice, and the documents in question might still be required here; but they suggested an application to the Court of Exchequer for leave to annex to the mandamus office or photographic copies. RE STEPHENS - - - - - - 187

TAXATION OF COSTS—*Master's Discretion—Counsel's Fees.*] The Court will rarely interfere to review a taxation upon a matter of discretion only. The master having allowed additional fees to counsel upon additional papers laid before them as requested on a consultation, a judge at chambers, adopting a suggestion that the additional brief contained no "new matter," but merely a statement in a new form of that which had already appeared in the original brief, and treating the question as one of principle and not of mere discretion, made an order for a review. The Court rescinded his order. WAKEFIELD *v.* BROWN - - - - - - 410

TENANCY, NOTICE OF—Sale of land - 196
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TIME FOR FILING PETITION—*Parliament—Return of Member—Time for filing Petition—Parliamentary Elections Act,* 1868 (31 *&* 32 *Vict. c.* 125), *s.* 6, *subs.* 2—*Ballot Act,* 1872 (35 *&* 36 *Vict. c.* 33), *s.* 2, *and sched.* 1, *rule* 44.] The "return" of a member to serve in Parliament is not made until the writ with the certificate of the returning officer indorsed thereon reaches the hands of the clerk of the Crown in Chancery so that he may act upon it. The election of a member for Poole took place on the 3rd of February. On the morning of the 4th, the returning officer indorsed on the writ a certificate of the return of W., and delivered it to the Postmaster at Poole, who forwarded it by the 12.30 p.m. mail, properly addressed and indorsed to the General Post Office in London, where it arrived about 6 p.m. It was sent thence by special messenger to the office of the clerk of the Crown at Westminster, where it arrived between 8 and 9 the same evening. The office being closed, the document was left with a servant of the housekeeper, and consequently did not reach the clerk of the Crown or any one connected with the office until the morning of the 5th:—*Held,* that the twenty-one days for the filing of a petition under s. 6, subs. 2, of the Parliamentary Elections Act, 1868, reckoned from the 5th. HURDLE *v.* WARING - - 435

TOTAL LOSS—Goods in besieged town **Ex. Ch. 518**
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VESTRY—Duty to cleanse sewers - 316
See EVIDENCE OF NEGLIGENCE. 2.

VOTE FOR PARLIAMENT—*Borough Vote—Freeman—Residence—Reform Act* (2 *Wm.* 4, *c.* 45), *s.* 32.] The claimant, a freeman of a borough, was an officer in the army serving with his regiment. When he obtained leave of absence, which he usually did for three months in the year, he used to reside at the house of his mother, within seven miles of the borough, occupying apartments there, which were always reserved for his use. He was unmarried, and had no other home than his mother's house:—*Held*, that in the case of an officer subject to the will and pleasure of the Queen, and who was therefore not sui juris, there could not be such an intention of returning as to constitute a constructive residence, and consequently that the claimant was not qualified.—*Rex* v. *Mitchell* (10 East, 511) discussed. FORD *v.* HART - - - - - 273

2. —— *Borough Vote—Part of a House—Structural Severance—Separate Rating—Representation of the People Act,* 1867 (30 *&* 31 *Vict.*

VOTE FOR PARLIAMENT—*continued.*

c. 102), *ss.* 3 *and* 61.] Sect. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), enacts that every man shall be entitled to be registered as a borough voter who (subs. 2) "is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough;" and (subs. 3) "has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises." And the interpretation-clause (s. 61) enacts that, unless there is something in the context repugnant to such construction, the word "dwelling-house" shall include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."—H., on the 31st of July, 1873, and for the preceding twelve calendar months, occupied part of a house in a borough, consisting of two rooms (not structurally separate from the rest of the house), in which he and his family entirely lived. These rooms were connected by a staircase and passage which were used by H. in common with the persons who occupied the rest of the house, the landlord not residing therein or retaining any control over the premises, but the tenants only having control over the outer door.—During the twelve months ending the 31st of July, 1873, two poor-rates were made, viz. one in November, 1872, the other in May, 1873. In both those rates the two rooms were rated separately from the rest of the house, and H. was rated in respect of them. The two rooms were not rated separately from the rest of the house in the rate made in May, 1872, which was the last rate made before the commencement of the year ending on the 31st of July, 1873.—At the time of the passing of the Representation of the People Act, 1867, there was no Act in force in the parish authorizing owners of houses to be rated instead of the occupiers:—*Held*, by Keating and Denman, JJ., that the two rooms constituted a "dwelling-house" within ss. 3 and 61; and that H. was sufficiently rated in respect of them, notwithstanding the house was not separately rated in the rate made in May, 1872; for that s. 3, subs. 3, only required the occupier to have been rated in respect of the premises to all rates made during the qualifying year, and that the separate rating of part of a house in s. 61 had reference to this; and that therefore H. was entitled to be registered.—*Held*, by Brett and Honyman, JJ., that s. 61 contained a definition of what the thing occupied for the twelve months must be, viz. a part of a house separately rated; and, therefore, as the rooms had not been separately rated till the rate in November, 1872, H. had not occupied for twelve months the thing required.—*Held*, by Brett, J., that the rooms were not occupied as a separate dwelling within s. 61.—*Stamper* v. *Overseers of Sunderland* (Law Rep. 3 C. P. 388) discussed. Boon *v.* Howard - - - 277

VOTE FOR PARLIAMENT—*continued.*

3. —— *Borough Vote—Payment of Rates—Composition—Representation of the People Act,* 1867 (30 *&* 31 *Vict. c.* 102), *s.* 3, *subs.* 4.] D. occupied premises under an agreement by which the landlord was to pay all rates. The rateable value was 10*l.* In May, 1872 (the May previous to the qualifying year), a rate was made at 8*d.* in the pound. The name of the owner and of D. the occupier both appeared in this rate, and the sum payable was carried out as 4*s.* 8*d.*, being a composition made by the landlord with the overseers. This sum was paid by the landlord in due time. But, it having been discovered that the composition was illegal, the landlord, of his own accord, in September, 1872, paid to the overseers an additional 2*s.*, to make up the full amount of the rate at 8*d.* in the pound:—*Held*, that D. had not paid an equal amount in the pound to that payable by other ordinary occupiers, within s. 3, subs. 4, of the Representation of the People Act, 1867. Durant *v.* Withers - - - - 257

4. —— *Borough Vote—Residence—Occupation as Inhabitant—Reform Act* (2 *Wm.* 4, *c.* 45), *s.* 27 *—Representation of the People Act,* 1867 (30 *&* 31 *Vict. c.* 102), *s.* 3—1 *&* 2 *Vict. c.* 106.] The incumbent of a benefice claimed to be entitled to a borough vote in respect of the occupation by him of his rectory-house. From the month of October till the month of June, 1873, in the qualifying year, the claimant had been absent from the house under the following circumstances. He obtained from the bishop a licence for non-residence from the 17th of May, 1871, up to the 31st of December, 1872, under 1 & 2 Vict. c. 106. He however retained possession of the house till October, 1872, when he left for the Continent, with the intention of returning in the following spring. He had arranged with a curate to serve the cure during his absence, and the curate obtained a licence from the bishop to officiate, and the bishop by such licence required him to reside, and assigned him the rectory-house as a residence. Upon the claimant's departure, the curate took up his abode in the rectory-house. By arrangement between them, three rooms in the house were retained by the claimant, and kept locked up, the key being left in the possession of a servant who had been employed by the claimant, but was, during his absence, employed by the curate. It was admitted by the claimant that he could not have returned to reside in the house without providing some other residence for the curate:—*Held*, that there was no residence by the claimant, during the last six months of the qualifying year as required by 2 Wm. 4, c. 45, s. 27; and that he had not occupied as an "inhabitant" during the qualifying year, as required by 30 & 31 Vict. c. 102, s. 3; and consequently, that he was not entitled to a vote. Durant *v.* Carter - 261

5. —— *Borough Vote—Break of Residence—Reform Act* (2 *Wm.* 4, *c.* 45), *s.* 27—*Representation of the People Act,* 1867 (30 *&* 31 *Vict. c.* 102), *s.* 3.] A clergyman claimed to be qualified to vote for a borough in respect of the occupation of a dwelling-house above the value of 10*l.*, in which he usually resided. He entered into an arrangement with another clergyman by which they agreed to exchange duties and residences for a certain period for the purpose of obtaining relaxation and a change of scene. In pursuance of this arrangement the claimant left his house and resided for two months, which included the last month of the

VOTE FOR PARLIAMENT—*continued.*

qualifying year, at a distance of more than seven miles from the borough, in the house of the other clergyman, who came and resided during the same period in the claimant's house:—*Held*, that there was a break of residence which prevented the claimant from being duly qualified. Ford *v.* Pye - - - - - - 269

6. —— *County Vote—Irish Peer.*] An Irish peer, who is not one of the representative peers for Ireland, nor the representative of any constituency in Great Britain, is not entitled to be placed on the register of voters. Lord Rendlesham *v.* Haward - - - - - 252

7. —— *County Vote—Description of Qualification—" Rent-charge on freehold house"—Amendment—Form of Consolidated Appeal—Indorsement on Case—*6 *Vict. c.* 18, *ss.* 40, 42–44, 100.] It is not necessary that the indorsement on the back of the case in a consolidated appeal should set forth the names, &c., of all the appellants; it is sufficient if it give the name of the person who appeals on behalf of himself and the other appellants, the names, &c., of the other appellants appearing in the body of the case.—The qualification of a county voter was described in the third column of the list as "rent-charge on freehold house":—*Held*, that the description was sufficient as pointing to a freehold rent-charge, or that, if not, the revising barrister should have amended. Sherwin *v.* Whyman - - - - 243

8. —— *County Vote—" List of Voters"—Unauthorized Alteration by Overseers—Notice of Objection—Service by Post—*6 *Vict. c.* 18, *ss.* 6, 40, 100.] By s. 100 of 6 Vict. c. 18, an objector may send his notice of objection by post, directed to the person objected to "at his place of abode as described in the said list of voters:"—*Held*, that, as regards county voters, "the said lists of voters" means the exact copy of the register sent to the overseers by the clerk of the peace, together with the list of claimants, as defined in s. 6.—Where, therefore, the overseers, finding an incorrect address of a voter in the copy of the register sent to them by the clerk of the peace, altered it by substituting the true address of the voter, and so published it:—*Held*, that a notice of objection directed and sent by post to such substituted address was not a compliance with s. 100; and the service of the notice was insufficient. Noseworthy *v.* Overseers of Buckland-in-the-Moor - - - - - - - 233

—— Conclusiveness of register - - 734
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WAIVER OF IRREGULARITY—*Court of Common Pleas, Lancaster—Service of Writ out of the Jurisdiction—Appearance—Waiver.*] A writ was issued out of the Court of Common Pleas at Lancaster, which is a superior Court, for a cause of action cognizable by that Court, but which arose beyond its jurisdiction. The service was upon the defendant's attorney beyond the jurisdiction; and he gave an undertaking to appear and did appear for the defendant:—*Held*, that the irregularity in the service was cured by the appearance. Oulton *v.* Radcliffe - - - - - - 189

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WARRANTY OF SEAWORTHINESS—*Ship and Shipping—Charterparty—Condition Precedent—Ship unfit for Cargo—Obligation of Shipowner.*] A charterparty provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods. It likewise specified different rates of freight for dry and wet sugar. The usual words as to the vessel's being tight, staunch, and strong were not in the charter, but it was provided that the vessel should be a good risk for insurance before and when receiving cargo, and that the master should provide a survey report declaring her to be so. The ship proceeded to her port of loading, and having been surveyed was reported to be a first-class risk. A cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from wet sugar, and when the cargo had been nearly all shipped it was found that there was an accumulation in the hold, the result of drainage from the sugar mixing with the ordinary leakage of the ship, which the pumps were unable to deal with from the nature of the material, and which rendered the ship unseaworthy for the voyage if she proceeded in her then condition. The ship was perfectly seaworthy, except with respect to this particular kind of cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or provide any other cargo.—Cross actions were brought, the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.—At the trial the jury found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps and with a reasonable cargo of wet sugar on board, have been seaworthy:—*Held*, affirming the decision of the Court below, that the shipowner by the charterparty undertook that the ship should be fit for the carriage of a cargo of wet sugar, and that the charterer was entitled to succeed in both actions. Stanton *v.* Richardson. Richardson *v.* Stanton - - 390

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BIBL. LONDIN UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.

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New Vols. 20/12/31.